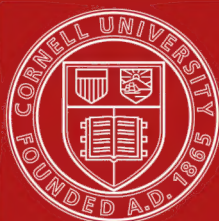


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**THE
PROCEDURE AND LAW
OF
SURROGATES' COURTS**

**OF THE
STATE OF NEW YORK**

TWO VOLUMES

**BY
WILLIS E. HEATON**
Former Surrogate of Rensselaer County

NEW THIRD EDITION

Entirely re-written in accordance with the Amendments to Chapter XVIII
made by the Legislature of Nineteen Hundred and Fourteen

VOLUME TWO

* * * * * "the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances."

TENNYSON



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D. E. Refers to Decedent Estate Law.

D. R. Refers to Domestic Relations Law.

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1379	35	1902	82, 417
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1818	130	2410	348
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1823	130, 301	2473	2
1824	130	2474	2
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1831	130	2480	4
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2626	77	2680	220
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2635	114	2689	345
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2643	95, 97	2697	206
2644	95	2698	14
2645	96	2699	470
2646	96	2700	108
2647	96	2701	245
2648	96	2702	245
2649	97	2703	247
2650	98	2704	246
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2474 Repealed. Rewritten into	2512	2512	2493, 2495
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2476	2515	2513a	2494
2477	2516	2514	2768
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2479 Repealed.		2516 Repealed. Rewritten into	2518
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2486	2480	2522 Repealed. Rewritten into	2526
2487	2481	2523 Repealed. Rewritten into	2526
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2492	2484	2526 Repealed. Rewritten into	2525
2493	2485	2529	
2494	2509	2527	2530
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2502 Repealed, except as found in... 2486, 2499, 2552, 2719		2534	2520
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2505 Repealed. Rewritten into	2504	2537	2699
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2547	2538	2601	2580
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2549 Already repealed.		2603	255b
2550 Repealed. Rewritten into	2548	2604	2556
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2555	2554	2609	2585
2556 Repealed. Rewritten into	2548	2610	2587
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2557	2744	2612 Repealed. Rewritten into	2564
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2652 Already repealed.		2704 In Dec. Est. Law.	
2653 Already repealed.		2705	2608
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2656	2766	2709 Repealed	2676
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2659 Repealed.		2712	2672
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2666 Repealed.		2719	2682, 2683
2667 Repealed. Rewritten into	2489	2720	2674
2668 Repealed.		2721	2688
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2670	2596	2723	2691
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2679 Repealed.		2733	2738
2680 Repealed.		2734 In Dec. Est. Law.	
2681	2602	2735 Already repealed.	
2682 Repealed.		2736 Already repealed.	
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2759 Repealed.		2812 Repealed	2737
2760	2710	2813 Repealed	2550, 2742
2761	2753	2814 Repealed. Rewritten into	2572
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2768 Already repealed.		2821	2643, 2649
2769 Already repealed.		2822 Repealed	2644, 2645, 2646
2770 Already repealed.		2823 Repealed	2646, 2647
2771 Repealed.		2824 Repealed	2647
2772 Already repealed.		2825 Repealed	2647, 2648
2773 Already repealed.		2826 Repealed	2646
2774 Repealed.		2827 Repealed	2644, 2645, 2646
2775 Already repealed.		2828 Repealed	2649
2776 Already repealed.		2829 Repealed	2648
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2778 Already repealed.		2831	2652
2779 Already repealed.		2832 Repealed. Rewritten into	2569
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2786 Already repealed.		2838	2654
2787 Already repealed.		2839	2655
2788 Already repealed.		2840	2656
2789 Already repealed.		2841 Repealed.	
2790 Already repealed.		2842	2660
2791 Already repealed.		2843	2558, 2661
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2797 Already repealed.		2849 Repealed	2729, 2730
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2484	2492	2524	2518, 2616, 2663
2485	2493	2525	2520, 2521, 2526
2486	2509	2526	2522, 2523
2487	2499	2527	new
2488	2500	2528	2524
2489	2503, 2667	2529	2518, 2520, 2524, 2525, 2526
2490	2481, 2518, 2662, 2663	2530	2524, 2527
2491	2508, 2509	2531	2525, 2532
2492	2509a	2532	2535
2493	2512	2533	2528
2494	2513a	2534	2530
2495	2512	2535	2606, 2727
2496	2513	2536	2546
2497	2513, 2541, 2620	2537	new
2498	2542, 2543, 2620	2538	2547
2499	2501, 2502, 2503, 2553, 2567	2539	2588
2500	2513	2540	new
2501	2567	2541	2545
2502	2481, 2509, 2510	2542	254b
2503	2509	2543	2539, 2619
2504	2504, 2505	2544	2540, 2619
2505	2506	2545	2544
2506	2504	2546	new
2507	2490	2547	2620
2508	2491	2548	2550, 2556
2509	2494	2549	2552, 2606
2510	2472, 2472a, 2663	2550	2518, 2813, 2857
2511	2518, 2523, 2617	2551	2553
	2655, 2663, 2698	2552	2502
		2553	2554

CODE TABLE.

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Present section	Former number	Present section	Former number
2554	2555	2609	2614
2555	2603	2610	2615, 2616
2556	2604	2611	2618
2557	2579, 2582, 2583, 2584	2612	2619, 2620
2558	2590, 2843	2613	2621
2559	2664, 2830	2614	2622, 2623
2560	2582, 2591	2615	2624
2561	2592	2616	new
2562	2593	2617	new
2563	2605, 2692	2618	2617
2564	2612, 2638, 2661	2619	new
2565	2612, 2638	2620	2498, 2620, 2623
2566	2637, 2638, 2641, 2852	2621	2629
2567	2633	2622	2630
2568	2594	2623	2631, 2632
2569	2685, 2817, 2832, 2858	2624	2684
2570	2686, 2833, 2834	2625	2636, 2640
2571	2687, 2688, 2833	2626	2613
2572	2689, 2814, 2835, 2859	2627	2642
2573	2690, 2836	2628	2639
2574	2599, 2691	2629	2695
2575	new	2630	2696
2576	2595	2631	2697
2577	2597	2632	2698
2578	2598	2633	2699
2579	2600	2634	2700
2580	2601	2635	2701
2581	new	2636	2702
2582	2596	2637	new
2583	2607	2638	2818
2584	2606, 2608	2639	2815
2585	2609	2640	2819
2586	new	2641	2820
2587	2610	2642	new
2588	2660	2643	2821
2589	2662	2644	2822, 2827
2590	2663	2645	2822, 2827
2591	2664	2646	2822, 2823, 2826, 2827
2592	2664, 2665	2647	2823, 2824, 2825
2593	new	2648	2825, 2829
2594	2669	2649	2821, 2828
2595	new	2650	2830
2596	2670, 2671	2651	2830
2597	2672	2652	2831
2598	2673	2653	new
2599	2674	2654	2838
2600	2675	2655	2839
2601	2676, 2677	2656	2840
2602	2681	2657	2851
2603	2612, 2643, 2660, 2693	2658	2852, 2853, 2854
2604	2644	2659	2860
2605	2645	2660	2842, 2855
2606	2693	2661	2843
2607	2621a	2662	2844
2608	2705	2663	2844, 2845

CODE TABLE.

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(Vol. 1 ends with ¶ 174, page 1025.)

Present section	Former number	Present section	Former number
2664	2746, 2846	2720	new
2665	2711	2721	2725, 2729, 2802
2666	2711, 2714	2722	2727
2667	2714	2723	2802
2668	2715	2724	2808
2669	2716, 2746	2725	2807, 2606
2670	2713	2726	2605, 2726, 2803, 2807, 2808
2671	2724		2837, 2847, 2848, 2856
2672	2712	2727	2727, 2803, 2808, 2847, 2856
2673	2714	2728	2727, 2856
2674	2720	2729	2728, 2810, 2849
2675	2707	2730	2728, 2743, 2810
2676	2709, 2710		2811, 2849, 2850
2677	2718	2731	2728
2678	2718	2732	2729, 2811
2679	2731	2733	2717, 2729
2680	new	2734	2605, 2606
2681	1822	2735	2724, 2743
2682	2719	2736	2744
2683	2719	2737	2745, 2812
2684	2717	2738	2733
2685	new	2739	2746
2686	2729	2740	2747
2687	2722	2741	2748
2688	2721	2742	2551, 2742, 2743, 2813
2689	2804, 2806	2743	2559, 2560
2690	2805	2744	2557
2691	2723	2745	2556
2692	new	2746	2558, 2561
2693	2613	2747	2562
2694	2642	2748	new
2695	2613	2749	2563, 2564
2696	new	2750	new
2697	2801a	2751	2560, 2569
2698	2602	2752	2565, 2566, 2711
2699	2537	2753	2564, 2634, 2730, 2761
2700	new		2802, 2810, 2850, 2856
2701	new	2754	2568, 2570
2702	2749	2755	2573
2703	2749	2756	2572, 2574
2704	2765	2757	2545, 2576
2705	new	2758	2575
2706	2755	2759	2577, 2581
2707	2756, 2757, 2798, 2799	2760	2578
2708	2758	2761	2579
2709	new	2762	2579, 2580, 2581
2710	2760	2763	2481, 2586, 2587
2711	2799	2764	2585
2712	2764	2765	2654
2713	2751	2766	2656
2714	2777	2767	2657
2715	2782, 2783	2768	2514
2716	2785	2769	2482
2717	2800	2770	2538
2718	2801	2771	new
2719	2502		

THE PROCEDURE AND LAW

OF

SURROGATES' COURTS

CHAPTER XXXV.

General Rights, Powers and Duties of Executors and Administrators from Time of Death of Deceased to the Time of Taking an Inventory.

- ¶ 175. Burial of body and protection of graves and burial lots.
- ¶ 176. Incurring funeral and burial expenses. Burial of soldier or marine.
- ¶ 177. Duty as to care of property and securities.
- ¶ 178. Title to personal estate vests in representative.
- ¶ 179. Rights of one of two or more executors or administrators.
- ¶ 180. Power of representative to act through attorney or agent.
- ¶ 181. Contracts made in representative capacity.
- ¶ 182. § 1916. Power to employ counsel, agents and assistants.
- ¶ 183. Obtaining possession of property left by deceased.
- ¶ 184. Proceeding to discover property.
- ¶ 185. § 2675. Petition and order.
- § 2676. Trial and decree.
- ¶ 186. Evidence and competency of witnesses.

¶ 175 Burial of the Dead; Ownership and Protection of Graves and Burial Lots.

Right to possession of a dead body for purpose of burial.

The burial of the dead is a subject which interests humanity to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one toward the dead — a duty to prop-

erly cover and bury a dead body. Such duty carries with it a certain legal right of possession and control, and this subject is exhaustively and with great learning discussed in a paper upon the "Laws of Burial," printed in 4 Bradf. 503, wherein the following conclusions are reached:

The right to bury a corpse and preserve its remains is a legal right which the courts of law will recognize and protect.

That such right in the absence of testamentary disposition belongs exclusively to the next of kin.

That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering the remains.

The courts recognize and enforce the right of next of kin to control the body of a deceased person as a sacred trust to be exercised in accordance with the natural sentiment, affection, or reverence which exists for the mortal remains of those we have "loved long since and lost awhile." *Cohen v. Cong. S. I.*, 85 App. Div. 65, 82 N. Y. Supp. 918.

The right to possession of a dead body for the purpose of preservation and burial is a legal right, the violation of which by an unauthorized and unlawful mutilation of the corpse before burial gives rise to an action for damages in favor of the surviving wife of deceased. *Foley v. Phelps*, 1 App. Div. 551, 73 N. Y. St. Repr. 190, 37 N. Y. Supp. 471.

It is lawful for a person to direct by will where his body shall be buried. *Matter of Bratt*, 10 Misc. Rep. 491, 65 N. Y. St. Repr. 247, 32 N. Y. Supp. 168.

As between a son and the widow (a second wife), the son was given charge of the body for burial. *Snyder v. Snyder*, 60 How. Pr. 368.

Where a question as to the custody of a body was to be litigated, the court refused to dissolve an injunction which directed

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that the body be retained in a vault until the determination of the action. *Butler v. Butler*, 91 App. Div. 327, 86 N. Y. Supp. 586.

The husband has the right to select the permanent burial place of the body of his wife, and the wife that of her husband. *Johnston v. Marinus*, 18 Abb. N. C. 72; *Secor v. Secor*, 18 Abb. N. C. 78.

Ownership of burial grounds and corpses.

A reference to the literature of burial grounds and burials may be found in 18 Abb. N. C. 75.

For an interesting article on the subject of the "Ownership of a Corpse Before Burial," see 4 Redf. 527, Appendix.

Rules of a church do not prevail.

Ecclesiastical law is not a part of the law of this State, nor are equitable rights to be determined by it; on the contrary, when a court of equity exercises its powers, it does so only upon equitable principles, irrespective of ecclesiastical or any other law. As was said in *Matter of Donn* (14 N. Y. Supp. 189): "When an ecclesiastical body assumes jurisdiction and control over a corpse, its acts are of a temporal and juridical character and not in any sense spiritual; and, under our laws and institutions, when it attempts so to do it is acting outside of its proper jurisdiction and domain." *Cohn v. Cong. S. I.*, 114 App. Div. 117; aff'd, 189 N. Y. 528.

Right of burial of husband, wife, parent or child in lot owned by the other.

Consult § 69, Membership Corporations Law.

Right to damages for autopsy.

See *Darcy v. Presbyterian Hospital*, 202 N. Y. 259; *Hassard v. LeLhane*, 143 App. Div. 424, 128 N. Y. Supp. 161.

Right to remove or disinter body.

It seems to be the general rule that where a body has once been properly buried, the courts will only allow a removal for very

good reasons. *Buchanan v. Buchanan*, 28 Misc. Rep. 261, 59 N. Y. Supp. 810; *Secor v. Secor*, 18 Abb. N. C. 78n; *Johnston v. Marinus*, 18 Abb. N. C. 72; *Matter of Richardson*, 29 Misc. Rep. 367, 60 N. Y. Supp. 534; *Matter of Bauer*, 68 App. Div. 212, 74 N. Y. Supp. 155.

The law throws around the bodies of deceased human beings a protection even in their graves. The right of Christian sepulture includes the right to have one's remains respected in his or her last resting place. Many circumstances arise from time to time necessitating a disturbance of the repose of the dead, but it must be some controlling public reason or superior private right which should induce the court to permit that to be done which from time immemorial has been considered abstractly as a work of desecration. *Matter of Ackermann*, 124 App. Div. 684.

"It may be that if an agreement were made with a cemetery association that remains there interred could not thereafter be disinterred, a court of equity would enforce the agreement; or if a religious corporation had a rule, to which a member subscribed, that if his remains were interred in a cemetery controlled by it they could not thereafter be removed, that a court of equity would refuse to exercise its powers to decree removal. Having found, as a fact, that an expressed intent that a body interred may, perhaps, be removed, entitled the proper parties thereafter to remove it, under the practice adopted by the defendant corporation, and that Daniel S., at the time the remains of Adela were interred, had this intent, was all that was necessary to entitle the plaintiffs, when applying to a court of equity, to the relief asked. Especially is this so when such finding is read in connection with the other facts developed at the trial, and there is no finding that he did not express this intent to the proper authorities of the defendant or the person having charge of the cemetery." *Cohen v. Cong. S. I.*, 114 App. Div. 117; aff'd, 189 N. Y. 528.

Right to protect graves, headstones, and burial lots.

The heirs of a decedent at whose grave a monument has been erected, or the person who rightfully erected it, can recover dam-

ages from one who wrongfully injures or removes it, or, by an injunction, may restrain one who, without right, threatens to injure or remove it, although title to the ground is in another.

Where a right of way to and a right to maintain a cemetery lot for burial purposes are held in common by several persons, any one or more of them may maintain an action to prevent by injunction the interruption or destruction of those rights without making the others parties. *Mitchell v. Thorne*, 134 N. Y. 536; aff'g 57 Hun, 405.

¶ 176 Incurring Funeral Expenses; Duty of the Undertaker as Well as of the Representative to Consider the Value of the Estate. See ¶¶ 231-234.

A person who furnishes burial is entitled to be reimbursed for the reasonable expenses of such burial, but he need not necessarily be reimbursed from the estate for the whole charge so incurred.

A person who contracts funeral expenses is personally liable to pay the same and may contract for as elaborate and expensive a funeral as he desires; but when he seeks to be reimbursed from the estate he will be allowed only such a sum as the surrogate deems to be a reasonable expenditure for such purpose when the estate left by the deceased and his station in life are duly considered.

The undertaker who furnishes the burial should bear in mind that these rules will be applied when his bill is passed upon by the surrogate, and he is, therefore, charged with the duty of ascertaining the apparent condition of the estate and the station in life of the deceased. If he is convinced that the person with whom he is dealing is ordering a more expensive funeral than will be approved on the application of these rules, he should require such person to become personally bound to pay the balance of the expenses after applying the reasonable sum which will be allowed by the surrogate. *Matter of Rooney*, 3 Redf. 15; *Matter of Primmer*, 49 Misc. Rep. 413. See 75 Misc. Rep. 79 to 97.

The necessity for proper burial creates an implied promise to repay the person who performed such duty.

A surviving husband is under a legal obligation to bury the corpse of his wife, being allowed to reimburse himself from the separate estate of his deceased wife if she has left any such estate. *Patterson v. Patterson*, 59 N. Y. 574; *McCue v. Garvey*, 14 Hun, 562; *Freeman v. Coit*, 27 id. 447. If the husband fails to perform this duty he is liable to an action to recover the reasonable value of its performance by any person who, on account of his absence or neglect, has properly incurred the expense of the necessary burial.

At common law, if a poor person of no estate dies it is the duty of him under whose roof the body lies to carry it decently covered to the place of burial, and where the owner of some estate dies the duty of the burial is upon the executor. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable, that he shall be repaid by such estate. *Patterson v. Patterson*, 59 N. Y. 574.

Where in the absence of the personal representative or the person bound to bury the dead body, or, from the necessity of the case, another incurs the expense of a proper burial, he may recover it from the person or estate that was bound to do it. *Quin v. Hill*, 4 Dem. 69; *Matter of Miller*, 4 Redf. 302; *Kessell v. Hapen*, 8 N. Y. St. Repr. 352.

If there are no near relatives of the deceased or none who will assume the expense of the proper burial of the deceased, it is the duty of the executor to make the necessary arrangements. In doing so he will become personally liable for all expense incurred, but he may be reimbursed therefor from the funds of the estate.

Burial of soldiers, sailors or marines.

Consult Poor Law, §§ 84, 85.

Where a soldier, sailor or marine, or his wife, dies leaving no property our State law has provided that he or she need not be

buried in the "Potters Field" but may be suitably buried at the expense of the county.

In such a case application should be made to the Superintendent of Burials of Soldiers, Sailors and Marines of the county, who will authorize the necessary burial and give an order on the county treasurer for \$50 therefor.

Markers or headstones.

Section 85 of the Poor Law now provides for marking a soldier's or sailor's grave with a proper headstone.

The substance of such law follows:

Burial of soldiers, sailors and marines.

The board of supervisors in each of the counties shall designate some proper person or commission, other than that designated for the care of poor persons, or the custody of criminals, who shall cause to be interred the body of any honorably discharged soldier, sailor or marine, who has served in the military or naval service of the United States, or the body of the wife or widow of any soldier, sailor or marine, married to him previous to nineteen hundred and ten, who shall die such widow, and who shall hereafter die without leaving sufficient means to defray his or her funeral expenses, but such expenses shall in no case exceed fifty dollars. If the deceased has relatives or friends who desire to conduct the burial, but are unable or unwilling to pay the charge therefor, such sum shall be paid by the county treasurer to the person so conducting such burial upon due proof of the claim, made to such person, or commission of the death and burial of the soldier, sailor or marine, or of the wife or widow of such soldier, sailor or marine, and audit thereof. Such interment shall not be made in a cemetery or cemetery plot used exclusively for the burial of poor persons deceased.

§ 84, Poor Law.

Headstones to be provided.

The grave of any deceased or honorably discharged soldier, sailor or marine who has served in the army or navy of the United States who shall have been heretofore buried in any of the counties of this state, but whose grave is not marked by a suitable headstone, and who died without leaving means to defray the expense of such headstone; or whose grave shall have remained unmarked for twenty-five years, by a suitable headstone, shall be marked by a headstone containing the name of the deceased, the war in which he served, and, if possible, the organization to which he belonged or in which he served. Such headstone shall not cost more than twenty-five dollars and shall be of such design and material as shall be approved by the board of supervisors, and the expenses of such burial and headstone as above provided for, and a

reasonable sum for the services of the person or commission designated in section eighty-four and the necessary expenses of said person or commission, shall be a charge upon and shall be paid by the county in which the said soldier, sailor or marine shall have died; and the board of supervisors or other board or officer vested with like powers, of the county of which such deceased soldier, sailor or marine was a resident at the time of his death, is hereby authorized and directed to audit the account and pay the expenses of such burial and headstone, and a reasonable sum for the services of the person or commission designated in section eighty-four and the necessary expenses of said person or commission; provided, however, that in case such deceased soldier, sailor or marine shall be at the time of his death an inmate of any state institution, including state hospitals and soldiers' homes, or any institution, supported by the state and supported by public expense therein, the expense of such burials and headstones shall be a charge upon the county of his legal residence. * * *.

§ 85, Poor Law.

Incurring expenses of a monument and other decoration of a burial plot.
See ¶ 231.

The law recognizes the right of every deceased to have his grave marked by a modest headstone.

This charge is made a part of the funeral expenses by section 2703, Code Civ. Pro., and being part of the funeral expenses the charge is a preferred one, and such a stone may be furnished whether or not the deceased left sufficient money to pay his debts.

But where it is desired to erect a monument or a stone more pretentious than the ordinary headstone, the value of the estate must be taken into consideration. Such decoration and display cannot be provided at the expense of the creditors of the deceased.

Therefore, the representative, before incurring such extraordinary expenses, should wait until he has ascertained the amount of the debts against the estate and has ascertained the value of the estate, and if there is a surplus to be distributed he may provide a monument suitable to the rank and station in life of the deceased and to the circumstances of his estate.

The representative must decide this question according to his own best judgment, having in view the rules which must govern him in making such decision and the possibility that his action may be assailed on the judicial settlement. *Matter of Erlacher*, 3 Redf. 8.

¶ 177 Duty as to Care of Property and Securities.

An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge, and does not warrant such safety under any and all circumstances and against all contingencies, accidents, or misfortunes. The true rule which should govern his conduct is that he is bound to employ such prudence and such diligence in the care and management of the estate or property as in general prudent men of discretion and intelligence employ in their own like affairs. *King v. Talbot*, 40 N. Y. 76. While this rule requires an executor or trustee to avoid all extraordinary risks in the investment of the moneys of the estate and to keep the same safely, it does not demand that he shall be made liable for contingencies which, under ordinary circumstances, could not have been anticipated. *McCabe v. Fowler*, 84 N. Y. 314.

Duty of administrator as to insurance on real estate.

While an administrator has no duty regarding the real estate, yet, on account of the general belief that he has, he ought at once to examine all fire insurance policies, and if they do not contain the standard clause protecting the heirs or devisees, the insurance should be rewritten.

An executor or administrator is the "personal representative" intended in a fire insurance policy where it refers to giving notice, etc., and he has the right to collect such insurance for the benefit of those entitled to the same. *Matthews v. Am. C. Ins. Co.*, 154 N. Y. 449, mod'g 9 App. Div. 339, 75 N. Y. St. Repr. 716, 41 N. Y. Supp. 304.

An administrator of an insolvent estate may insure the buildings on real estate owned by the deceased, and the proceeds, in case of fire, go to the administrator to pay debts. *Herkimer v. Rice*, 27 N. Y. 163.

Care and management of securities.

When a representative receives general securities as part of the assets coming to his hands, he is at once charged with an active

duty to protect and preserve the funds so invested. As a general rule all investments which are not of the classes allowed to trustees, should be realized upon at once, or as soon as a favorable opportunity occurs. Owing to a depreciated market, it may not be wise in all cases to sell immediately, but in such cases the condition of the market should be watched daily, and expert advice obtained as to the prospects and the actual value of such investments. Because such securities may be bringing in a good rate of interest, representatives are often tempted to hold them for months, and perhaps thereby jeopardizing the funds. In ordinary cases it is not the duty of the representative to invest, but to collect, funds, and he should not unduly hold securities, because they are bringing in a fair, or even a good, return. Especially is this true under the present practice by which an estate can, and ought to be, settled immediately after the expiration of the publication of notice to creditors.

Realizing on poor investments.

An examination of all investments should be made at once, for some of them may need immediate attention, in order that the principal or a part of it may be saved. Where there are mortgages, inquiry should be made from the proper officials to ascertain whether all taxes upon the property have been paid.

Where interest has not been paid, it may be necessary to at once begin a foreclosure in order that the investment may be realized on in time for the judicial settlement.

May accept additional security or collateral.

An executor having found an unsafe investment may take securities and collateral in a diligent effort to save the investment and will not be held liable for a failure to realize the full amount upon them. *Ormiston v. Olcott*, 84 N. Y. 339.

Proof of existence of mortgage.

Where a question of the existence of assets arises, proof of the record of a mortgage in the name of the deceased without other

evidence tending to show that it was owned or possessed by deceased at the time of his death is not sufficient proof. *Steele v. Conn. Gen. Life Ins. Co.*, 31 App. Div. 389; 52 N. Y. Supp. 373; aff'd, 160 N. Y. 703.

Investments for trust funds. See ¶ 336.

Certain classes of securities are by statute made legal for investment by savings banks, and such securities are legal investments for trust funds. Consult section 239, Banking Law, as amended by chap. 369, Laws of 1914, and section 111, Decedent Estate Law.

¶ 178 Title to Personal Estate Vests in the Duly Appointed Representative and Does Not Upon His Death Pass to His Representative.

The personal estate of a deceased person vests in his personal representative, and the next of kin have no standing in a court of law or equity to recover possession of the same. Such representatives are the proper parties to enforce any right to the personal estate which the deceased had at the time of his death. *Delabarre v. McAlpin*, 71 App. Div. 591; 76 N. Y. Supp. 301.

Right to possession of personal property.

The administrator is the owner in trust and entitled to the possession of the assets of the intestate. *Walton Adm. v. Walton Ex.*, 1 Keyes, 15.

The surrogate may compel production of securities, etc., and make any proper order as to their custody. *Wood v. Brown*, 34 N. Y. 337.

An executor, as such, takes the unqualified title of all personalty not specifically bequeathed. He holds not in his own right, but as a trustee, for the benefit (1) of the creditors of the testator, and (2) of those entitled to distribution under the will, or if not all bequeathed, under the Statute of Distributions.

As to the chattels and choses in action specifically bequeathed, an executor has but a qualified title, the right to apply them in

the discharge of debts after first exhausting all other property applicable to that purpose. If he consent to their delivery to the legatees they acquire a perfect legal title to the article or demand, and in case the remaining property of the testator is insufficient to pay his debts the recipients of the specific legacies are liable under the statute to pay the amount of value of the legacies received by them.

The title of one who takes the entire estate under the will stands on the same footing, and is just as absolute, and he, with the assent of the executor, can recover in his own name a chose in action, or make it available by way of counterclaim.

The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors, and when they are paid the trust estate sinks into and is merged with the beneficial interest, and the sole devisee and legatee becomes vested with the legal title of all the testator's estate. *Blood v. Kane*, 130 N. Y. 514, rev'g 52 Hun, 225.

Will of real estate only.

The title to personal estate vests in an executor named in a will, even though no disposition is made of such personal estate. *Matter of Maccaffie*, 7 Misc. Rep. 264; aff'd, 127 App. Div. 21.

Title where there is partial intestacy.

The fact that the will becomes in part inoperative does not affect the right of the executor to receive the whole estate and to administer upon it. *Matter of Murphy*, 144 N. Y. 557.

Action at law by one representative against the other for possession of property.

The rule appears to be that, owing to the community of interest, no action lies by one executor or administrator against his co-representative at law. *McGregor v. McGregor*, 35 N. Y. 218; *Smith v. Lawrence*, 11 Paige, 206; *Rogers v. Rogers*, 75 Hun, 133; *Dean v. Roseboom*, 37 id. 310; *Whitney v. Coapman*, 39 Barb. 482. The reason for the rule is stated in *Smith v. Lawrence* (11 Paige, 206), in which the chancellor said: "In the com-

mon-law courts one executor or administrator cannot bring a suit against his coexecutor or coadministrator to recover a debt which was due from the latter to the testator or intestate, for each has the same right to the possession of the fund which belongs to both as the representatives of the estate of which they are joint trustees, and the effect of a common-law judgment in favor of one against the other would be to give the former the right to issue an execution and transfer the whole fund to his own exclusive possession; a court of equity, however, from its peculiar mode of administering justice, can settle the question as to the fact of indebtedness and as to the amount due from one of the executors to the estate of which both are trustees, whenever the decision of this question becomes necessary, without changing the possession of the fund."

This rule appears never to have been departed from, at least so far as the cases in this State are concerned, and to have been applied to cases of alleged conversion of the funds of the estate. *Whitney v. Coapman*, 39 Barb. 482; *Peters v. Smith*, 60 Misc. Rep. 203, 111 N. Y. Supp. 842.

Where coexecutors or coadministrators disagree as to the custody of estate property, the surrogate's court may give directions in regard thereto. See § 2698, ¶ 14.

When an executor, administrator, guardian, or testamentary trustee dies, his executor or administrator has no right to continue the administration of the estate.

Upon the death of the representative his duties fall upon a successor, and his executor or administrator has no duty to perform in connection with the first estate except to keep the remaining assets safely and as speedily as possible render an account of the acts and doings of the deceased representative.

An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof as such executor.

Under this statute an executor or administrator of a deceased executor or administrator is merely the temporary custodian of such part of the unadministered estate of the first testator as may come into his hands. As he has no power to compel delivery to himself, he is under no duty to assume possession, and unless he volunteers to do so he cannot be made liable for the default or misappropriation of others. *Matter of Hayden*, 204 N. Y. 330.

Executor of a deceased executor has no right to take any charge or control of bonds coming into his hands except for the purpose of accounting. *Scholey v. Halsey*, 72 N. Y. 578.

The beneficiary of a trust cannot maintain an action for recovery and distribution of the fund, the trustee having died. *Hart v. Goadby*, 138 App. Div. 160, 123 N. Y. Supp. 166.

Where a trust has been established and set apart, it does not pass to the administrator *cum testamento annexo*, but must go to a trustee to be appointed. *Jewett v. Schmidt*, 39 Misc. Rep. 502; *aff'd*, 108 App. Div. 322, 95 N. Y. Supp. 631; *aff'd*, 184 N. Y. 608.

¶ 179 Rights of One of Two or More Executors or Administrators.

Executors.

It is provided by section 66 of the Real Property Law that every estate vested in executors or trustees as such shall be held by them in joint tenancy.

Coexecutors, however numerous, constitute an entity, and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the administration of estates, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. *Barry v. Lambert*, 98 N. Y. 300, 308; *Wheeler v. Wheeler*, 9 Cow. 34; *Bogert v. Hertell*, 4 Hill, 492; *Jackson v. Shaffer*, 11 Johns. 513. But this is limited to acts of a ministerial nature; acts that call for the exercise of judgment and discretion one of several cannot do. The concurrence of all is necessary. *Perry on Trusts*, § 411; *Fritz v. City*

Trust Co., 72 App. Div. 532, 76 N. Y. Supp. 625; *Matter of Ehret*, 70 Misc. Rep. 576, 127 N. Y. Supp. 934.

To transfer property.

An executor may make a transfer of personal property which will give a good title to a *bona fide* purchaser, although the transfer is made in violation of the duty of the executor. *Leitch v. Wells*, 48 N. Y. 585.

One of two or more executors has power to dispose of assets even if his coexecutors do not join. *Geyer v. Snyder*, 140 N. Y. 394; aff'g, 69 Hun, 115.

The act of one of two or more executors if within the scope of their authority is binding upon his associates. *Barry v. Lambert*, 98 N. Y. 300.

May discharge mortgage.

Where a mortgage is made to two persons described as "executors of the estate of," etc., either may discharge such mortgage and in the event of one dying the survivor may execute the discharge. *People ex rel. Eagle v. Keyser*, 28 N. Y. 226.

Borrowing money.

One executor has no authority to borrow money without the consent of the other. *Bryan v. Stewart*, 83 N. Y. 270.

Power to sell real estate must be executed jointly. See ¶ 208.

Where power of sale is given by a will to executors, the deed must be executed by all the executors who qualify and who are in office when the deed is executed. *Wilder v. Rannly*, 95 N. Y. 7; *Mohn v. King*, 41 App. Div. 611, 58 N. Y. Supp. 97.

Where sale has been duly made by all, execution by one will convey title.

"The assignee of the purchaser at the sale paid the whole of the consideration money to one of the executors and all that was needed to perfect the transaction of sale was that Lunny should unite with his coexecutor in the deed, or, himself, execute a deed. This was not a case of the nonexecution of the power of sale, but

of a defective execution; because the intention to execute the power was effectuated by the actual sale. The deed was but an incident, and the final consummation, of a sale under which the plaintiff, or her predecessor in the title, was let into possession. The case is one where equity should grant relief, which may be administered through these provisions of the Code. *Brown v. Crabb*, 156 N. Y. 447. The general rule, undoubtedly, is that trustees must unite in a disposal of the trust estate, and a deed of land from less than all the living trustees is invalid. *Brennan v. Willson*, 71 N. Y. 502. The requirement of our statutes, that, where a power is vested in several persons, all must unite in its execution, was complied with, in effect, by the actual sale made by the executors. It would be a most harsh and inequitable application of the statute, if, after executing the power by this sale, the subsequent death of one of the executors, who had united in the selling, but who had not joined in a conveyance, should, from the impossibility of procuring, or compelling his deed, result in avoiding the plaintiff's title." *Brown v. Doherty*, 185 N. Y. 383, 389; aff'g, 93 App. Div. 190.

Administrators. See ¶ 217.

The rule is somewhat different as to administrators. The act of one is not deemed to be the act of all.

The payment by one administrator with or without the consent of the other upon a note against the estate will save it from the operation of the statute. *Matter of Bradley*, 25 Misc. Rep. 261, 54 N. Y. Supp. 555; aff'd, 42 App. Div. 301, 59 N. Y. Supp. 105.

Effect of death of one or more executors or administrators.

Where one of two or more executors or administrators dies or his letters are revoked, the remaining ones shall continue to exercise the duties of their office and no new executor or administrator can be appointed to take the place of the one dead or removed.

From § 2563, Code Civ. Pro.

Where all the executors or administrators are removed new representatives must be appointed.

From § 2606, Code Civ. Pro.

¶ 180 Power of Representative to Act Through Attorney or Agent. See ¶¶ 182, 406.

An executor or trustee to whom a power has been given by a will may not delegate his judgment and discretion in the execution of the power, but, having exercised the judgment and discretion with which he has been invested, there is no authority which prohibits him from delegating to others the performance of his determination in regard thereto. A ratification of the act of the agent or attorney is equivalent to the exercise of the judgment and discretion of the representatives in the first instance. *Gates v. Dudgeon*, 173 N. Y. 426; rev'g, 72 App. Div. 562, 76 N. Y. Supp. 561.

Representative may delegate power to execute a contract of sale, but not to make the contract.

“The will of the deceased devised the land to the defendants as executors in trust with power to sell at the expiration of the trust and distribute the proceeds among the testator's children. The defendants both, and together, entered into an oral agreement to sell the land, and the contract was reduced to writing at their direction; but when it afterward came to the signing, the defendant Charles P. Smith did not sign, and was not present at the signing, but he authorized and directed the other defendant to act for him in the signing, and to sign. The contract by its terms purports to be by both, but it is only signed by the one, and by his name only.

“The one being authorized by the other, his signing binds both, the contract not being under seal. It is the same as the case of an agent signing his own name instead of that of his principal to an executory contract; the principal is bound, and oral evidence to prove that he authorized the agent to sign is not excluded by the Statute of Frauds. *Briggs v. Partridge*, 64 N. Y. 357.

“The rule that delegated authority involving the exercise of judgment and discretion cannot be redelegated is not in the way. The trust authority to agree to sell was not delegated; no exercise

of judgment and discretion was delegated; only the formal signing was delegated after the terms of the contract had been agreed upon." *Roe v. Smith*, 42 Misc. Rep. 89, 85 N. Y. Supp. 527.

When an executor empowered by the will to sell real estate, makes a contract therefor the contract may be enforced in equity. *Bostwick v. Beach*, 103 N. Y. 414.

¶ 181 Force and Effect of Contracts Made in Representative Capacity. See ¶¶ 128, 182.

Executors, administrators and trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate and thus create a liability not founded upon the contract or obligation of the testator. While as between the executor and the person with whom he contracts the latter may rely on the contract, the beneficiaries are not concluded by the executor's act, but the propriety of the charge and the liability of the estate therefor must be determined in the accounting by the executor. *O'Brien v. Jackson*, 167 N. Y. 31; rev'g, 42 App. Div. 171, 58 N. Y. Supp. 1044.

A bond legally given to accompany a mortgage was not signed in the official capacity of the executrix — *held* valid as an obligation of the estate and not of the executrix personally. *Roarty v. McDermott*, 146 N. Y. 296.

A trustee was authorized by the will to repair houses and made contracts for such repairs — *held* that the contracts could not be enforced against him in his representative capacity. *O'Brien v. Jackson*, 167 N. Y. 31.

In a proper case a contract signed "A. B., executor," etc., will bind the estate, and not the executor personally as, in the same manner as though it were signed "A. B., as executor," etc. *Chouteau v. Suydam*, 21 N. Y. 179.

Contracts of an executor for legal services to be rendered him in the interest of the estate are his personal contracts and do not

bind the estate. *Parker v. Day*, 155 N. Y. 383; *Balz v. Underhill*, 19 Misc. Rep. 215, 44 N. Y. Supp. 419.

Claim was made against the estate on account of a diamond ring claimed to have been unlawfully taken from the donee by the executor — *held* that the executor could not create a liability against the estate by his act. *Van Slooten v. Dodge*, 145 N. Y. 327.

A contract for services to be rendered in the interest of the estate represented by an executor, although made by such executor in his representative capacity, does not bind the estate or create a charge upon the assets in his hands, but binds the executor personally. *Austin v. Munro*, 47 N. Y. 360.

A power of attorney to transact estate business which describes the person executing it as executrix of an estate is valid even though signed in the individual name of the executrix. *Myers v. Mutual L. Insurance Co.*, 99 N. Y. 1; *aff'd*, 32 Hun, 321.

Where an executor attempts to complete a contract of deceased involving employment of labor, he cannot make the estate liable for damages on account of negligence. *Decillis v. Marcelli*, 152 App. Div. 304, 136 N. Y. Supp. 573.

Giving notes.

A representative has no power to make a claim for funeral expenses a charge upon the estate of the deceased except by payment and then charging the amount in his accounts. The giving of a note for them does not change the rule. *Matter of Kirkpatrick*, 1 Gibb. Sur. Rep. 71.

Endorsement of note.

Where deceased had endorsed and discounted a note, and his executors afterwards assign such note, the endorsement of the deceased should be erased or limited. *Packard v. Dunfee*, 119 App. Div. 599, 104 N. Y. Supp. 140.

Agreement to collect from estate.

It has been held that where services are rendered to an executor or administrator under an express agreement on the part of the

creditor to confine his claim for compensation to the estate itself or to the executor or administrator in his representative capacity, such creditor will be confined to the remedies existing for the enforcement of the agreement as it has been made by him, but there must be a special agreement to that effect, and the fact that the contract is made in form by the personal representative in his representative capacity is insufficient to charge the estate. *Foland v. Dayton*, 40 Hun, 563; *Martin v. Platt*, 51 id. 429; *Noyes v. Turnbull*, 54 id. 26, 30; *Rogers v. Wendell*, id. 540, 547; *Brackett v. Ostrander*, 126 App. Div. 529, 110 N. Y. Supp. 779.

Purchase and sale of real estate.

Where executors attempt to purchase land they acquire title individually and the money paid therefor must be accounted for. *Paolicchi v. Am. Tel & T. Co.*, 119 App. Div. 609, 104 N. Y. Supp. 162.

A contract by an administrator to sell real estate of an intestate is binding upon him personally and judgment may be had against him for damages. *Elliott v. Asiel*, 120 App. Div. 829, 105 N. Y. Supp. 655.

¶ 182 Power to Employ Counsel, Agents and Assistants.

For many purposes the executors may employ agents and assistants, and, when necessary, attorneys and counsel, and the extent to which they may do this will depend upon the situation of the estate and the greater or less occasion for such services as do not properly belong to the executors to render. See ¶ 406.

Thus the affairs of an estate may be so extensive or complicated as to warrant the executors in employing a bookkeeper, or an agent to let real estate intrusted to their management, or to collect rents, or an agent to make other collections, make journeys for the collection or protection of the assets, or for the performance of other duties. *Collier v. Munn*, 41 N. Y. 143.

Employment of counsel. See ¶¶ 135, 408.

When served with legal process in an action or proceeding it is the duty of the representative to employ counsel to ascertain the nature of suit and advise as to what course it is proper to pursue. *Matter of Hutchinson*, 84 Hun, 563, 32 N. Y. Supp. 869. If it becomes evident at any stage of the proceedings that the estate is no longer interested the representative is not justified in continuing the employment at the expense of the estate. *Matter of Ordway*, 196 N. Y. 95; mod'g, 131 App. Div. 339.

Employment of member of executor's or administrator's firm.

A representative may employ his partner to do any necessary work for him or the estate and his reasonable compensation may be paid, but the representative should have no interest in such fund or money so paid, and such compensation must belong wholly to the partner so employed. *Parker v. Day*, 155 N. Y. 383; rev'g, 12 Misc. Rep. 510, 67 N. Y. St. Repr. 378, 33 N. Y. Supp. 676, which rev'd 9 Misc. Rep. 298, 61 N. Y. St. Repr. 313, 30 N. Y. Supp. 267.

Executor, administrator, guardian or trustee acting as his own attorney.

By the amendment of 1914 to former section 2730, now section 2753 (¶ 135), a radical change was made, in that now an attorney who is also executor, administrator, guardian or testamentary trustee, may act as his own counsel or attorney and be paid such sum therefor as the surrogate may allow on the judicial settlement.

In most cases this will result in a saving of attorney's fees, as such official, having also his commissions will receive a reasonable compensation for his services without making his counsel fees unduly large. This amendment will also prevent the subterfuge often employed where an attorney appears for such an official and is paid a considerable sum when the other has done all the real work.

Action by executor, administrator, or other trustee for reimbursement for costs and expenses.

A surety, including a drawer or endorser, may recover, in an action against his principal; and an executor, administrator or other trustee, may, where

the trust estate is insufficient to reimburse him; recover in an action against the beneficiary whom he represents; his reasonable costs and other expenses, incurred necessarily and in good faith, in the prosecution or defence, by the express or implied consent of the principal or beneficiary, of an action or special proceeding, relating to the demand secured, or to the trust estate, as the case requires. This section does not affect any special agreement relating to those costs and expenses.

§ 1916, Code Civ. Pro.

This section does not relate in any manner to the question whether the costs of an action against an executor or administrator should be charged against him personally. *Supplee v. Sayre*, 51 Hun, 30, 20 N. Y. St. Repr, 554, 3 N. Y. Supp. 627.

An equitable action can be maintained against the estate on behalf of a creditor in case of the fraud or insolvency of the executor, or when he is authorized to make an expenditure for the protection of the trust estate, and he has no trust fund for the purpose. In the latter case, if unwilling to make himself personally liable, he may charge the trust estate in favor of any person who will make the expenditure. Charges against the trust estate in such cases can be enforced only in an equitable action brought for the purpose. To that action the beneficiaries and *cestuis que trustent* are necessary parties. The trust estate cannot be depleted or swept away except in an action which they may defend. *O'Brien v. Jackson*, 167 N. Y. 31; rev'g, 42 App. Div. 171, 58 N. Y. Supp 1044.

¶ 183 Obtaining Possession of Property Left by Deceased.

Filing certificates.

Before any money on deposit in any bank can be withdrawn by the executor or administrator it is necessary to file with such bank a certificate showing the grant of such letter. This certificate is issued upon application by the clerk of the court.

It is advisable to obtain and file this certificate at once as under the rule enforced by the State Comptroller in regard to transfer taxes no bank is permitted to pay out any money, so deposited, until it has given to the Comptroller ten days' notice of the filing

of such certificate. It is also necessary to file such a certificate with each corporation which has issued any securities held by the deceased. The attorney for the Comptroller will usually give a waiver of this notice.

Obtaining possession of securities in a safe-deposit box.

On application by the representative for an order that a safe-deposit company turn over a tin box in its vaults which is claimed by another than the company, the order should be granted. *Matter of Scott*, 34 Misc. Rep. 446, 70 N. Y. Supp. 425.

Necessity for prompt action in taking possession of jewelry and other articles.

The representative must proceed with all diligence to obtain actual possession of all personal estate in order to preserve it from waste and depreciation, and to prevent its falling into the hands of those who would secrete or convert it. Too often articles of jewelry and other valuable property are left for days or weeks without a visible owner and thereby become a temptation to greedy relatives or friends. All personal property should at once be reduced to the actual possession and control of the representative, so that it may be properly inventoried and accounted for.

When necessary for its safety the property may be stored, or if it is of a nature to require personal care, like animals or perishable property, a care taker may be hired.

Insurance.

If there exists an insurance policy upon such property, it is better to notify the agent and have the proper endorsement in favor of the executor or administrator, or a new policy should be taken out in favor of the representative.

Furs and other articles liable to be destroyed.

In some cases there are furs, rugs, and valuable clothing which should be protected from destruction, and the representative should exercise proper care to protect such property.

¶ 184 Proceeding to Discover Personal Property of a Deceased Person Which is Unlawfully Withheld from the Representative or Information as to the Existence of Such Property.

At the very beginning of his duties a representative is often met by a condition of uncertainty as to whether or not he has obtained possession or knowledge of all the personal property of the deceased. He may have good reason to think that certain property in the possession of others really belonged to the deceased at the time of his death, but he may have no positive evidence of the fact, but he might be able to obtain such evidence through a proceeding for such purpose.

The proceeding to obtain possession of such property or such information is commonly called a "discovery proceeding" and is regulated by sections 2675 and 2676, Code Civ. Pro.

The present statute is derived from chapter 394 of the Laws of 1870, which, together with its various modifications since that date, has been the subject of much discussion by the courts. In 1880 the General Term of the Third Department held that this statute was unconstitutional, because, under its provisions, a person might be deprived of his property without due process of law. *Matter of Beebe*, 20 Hun, 462. The following year, the General Term of the First Department held that the act was not unconstitutional, because it involved merely the question of possession, in a case where possession was wrongfully withheld from the petitioner; and that, although it dispensed with a jury trial, it was not, on that account, to be considered unconstitutional; for a trial by jury was not in all cases an essential element in due process of law; for cases within the jurisdiction of the equity courts, although they often involved the title and final disposition of property, are, nevertheless, due process of law within the meaning of the Constitution. *Matter of Curry*, 25 Hun, 321. The same year, 1881, the Legislature amended the statute by inserting in section 2710, Code Civ. Pro., the following provision: "In case the person so cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the posses-

sion thereof by virtue of any lien thereon or special property therein, the surrogate shall dismiss the proceeding as to such property so claimed."

Jury trial provided.

The present practice allows the trial of the title, but it also provides that any party claiming title may demand a trial of that question by jury, so that the constitutional objection has thus been overcome.

Proceeding is inquisitorial.

In *Matter of O'Brien v. Baker*, 65 App. Div. 282, the court seems to have asserted, more clearly than in any former case, the legislative intent of providing in this proceeding a remedy which should be, to some extent, inquisitorial in its character, and to have dissented from a construction of the statute made with the avowed purpose, as expressed by Surrogate Ransom, of preventing the remedy from becoming such. The amendments seem to emphasize this aspect of the proceeding.

These sections were not intended as a substitute for ordinary civil remedies in cases where the latter are alone appropriate. The object was to provide a summary means of discovery, and, in case of a mere naked possession of the decedent's "money or other personal property," to compel delivery to the legal representative. In the case of money, it must be a specific sum tortiously withheld, not merely money due belonging to the deceased in the sense of an indebtedness. *Matter of Nay*, 6 Dem. 346, 19 N. Y. St. Repr. 259; *Matter of Knittel*, 5 Dem. 371, 7 N. Y. St. Repr. 752. So as to the personal property in general. It must be some definite thing upon which the person proceeded against has no possessory claim, and which can be described in the decree.

Thus, the executor or administrator is entitled, without delay, to make a full and complete inventory, to frustrate fraudulent concealment of the decedent's personalty and to reduce the latter to executorial possession. In effecting this purpose he has the

efficient aid of the statute. *Matter of Cunard*, 27 N. Y. St. Repr. 128, 7 N. Y. Supp. 553.

General history and scope of the proceeding before the present revision.

Soon after the important amendments to the Code provisions, section 2706, etc., the general history and scope of this proceeding was very ably considered in *Matter of Gick*, 49 Misc. Rep. 32; aff'd, 113 App. Div. 16, with reference to the then recent amendments.

In the case of *O'Brien v. Baker*, 65 App. Div. 282, Judge Ingraham, in a carefully written opinion, says (p. 286): "It will be noticed that this section (2707) is not confined to a proceeding to compel a person in the possession of property belonging to a decedent to deliver such property to the administrator. It also provides for a case where there is personal property that should be included in an inventory or appraisal, and which 'is in the possession, under the control or within the knowledge or information of a person who withholds the same' from the representative of the deceased, or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, so that it cannot be inventoried or appraised. It is for the purpose of procuring information as to the property that should be inventoried and appraised as well as of the property that should be delivered to the administrator that the proceeding is allowed, and an examination of a person having knowledge of the decedent's property is allowed so as to give information as to such property which the administrator here is required to inventory or appraise, although its present situation is such that it would be impracticable to order its delivery to the administrator. * * * The petition to be presented to the court must allege facts tending to show that money or other property which should be delivered to the petitioner, or included in an inventory or appraisal is in the possession, under the control, or within the knowledge or information of a person who withholds the same from him, or refuses to impart

knowledge or information he may have concerning the same, or to disclose any other fact which would aid such executor or administrator in making a discovery of such property.”

¶ 185 *Idem*; Petition; Order to Attend Examination or Trial. Proceeding to discover property withheld.

An executor or administrator may present to the surrogate's court from which letters were issued to him, a petition setting forth on knowledge, or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him; or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, and praying an inquiry respecting it, and that the respondent may be ordered to attend the inquiry and be examined accordingly and, to deliver the property if in his control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must make an order accordingly, which may be made returnable forthwith, or at a future time fixed by the surrogate and may be served at any time before the hearing. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment, or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in surrogate's court.

§ 2675, Code Civ. Pro.

Effect of revision. § 2707 amended.

The revision makes a radical change in this section. Under it a citation does not issue but an order is made directing the person complained of to attend and be examined and to deliver the property mentioned, if in his control. The provision for service contained in former section 2708 is inserted here, and that section is repealed. Direction to a person not a resident of the county to appear before the surrogate of that county is omitted, and the person must now appear before the surrogate of original jurisdiction.

Petition.

The petition is sufficient to require the issue of an order if it contains allegations “tending to show” that there is property

withheld from the executor or administrator. *Mead v. Sommers*, 2 Dem. 296.

The petition need not state the sources of his information or the grounds of his belief. *Walsh v. Downs*, 3 Dem. 202.

The proceeding may be brought by a temporary administrator. *Matter of O'Brien*, 34 Misc. Rep. 436, 69 N. Y. Supp. 1022; aff'd, 65 App. Div. 282, 72 N. Y. Supp. 1001.

All executors or administrators must join in making the petition or the one refusing to join must be cited. *Matter of Slingerland*, 36 Hun, 575.

The petition must be verified; it may be made on knowledge, or on information and belief; it must set forth the facts tending to show that some person named withholds money or personal property from petitioner's possession, or withholds information concerning the same; it may be accompanied by an affidavit or other evidence tending to support the allegations.

Order.

If the surrogate is satisfied that there are reasonable grounds for the inquiry, he must make an order returnable forthwith, or at a future time fixed by the surrogate, directing the respondent to deliver the property mentioned, or appear and be examined.

Trial and decree.

If the person directed to appear submits an answer denying any knowledge concerning, or possession of, any property which belonged to the decedent in his lifetime, or shall make default in answer, he shall be sworn to answer truly all questions put to him touching the inquiry prayed for in the petition. If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly.

§ 2676, Code Civ. Pro.

Effect of revision. §§ 2709 and 2710 combined in part.

This section is practically new, although combining parts of sections 2709, 2710.

An answer may be submitted by the respondent denying possession, or unlawful possession, or any knowledge of the subject matter, or he may fail to answer, in either of which cases he shall be examined, and a decree made in accordance with the facts. Such a decree will affect the possession or right to the possession of the property mentioned. If, however, the respondent files an answer raising an issue of title, or alleges a right to possession then such issue shall be tried in the usual manner of a trial, instead of an examination being held. Such trial must be before the surrogate or before the surrogate and a jury as the parties elect.

Abatement; second examination.

Where a proceeding has been once instituted it does not abate by a failure to adjourn. A witness once examined cannot be examined in a new proceeding, but can be brought in for further examination in the original proceeding on proper application. *Matter of Spreen*, 1 Civ. Pro. Rep. 375.

Witness may be punished for contempt.

A refusal to attend, be sworn, or to answer a proper question is punished as for contempt.

When maintained.

The proceeding may be maintained against a person withholding information even though he has no property of the deceased. *Matter of O'Brien*, 34 Misc. Rep. 436, 69 N. Y. Supp. 1022; aff'd, 65 App. Div. 282, 72 N. Y. Supp. 1001.

May be maintained against a bank which had knowledge of assets of the deceased derived from having been in possession of securities pledged by the deceased for loans. *Matter of Richardson*, 31 Misc. Rep. 666, 66 N. Y. Supp. 94.

When dismissed.

Where a proceeding is brought to recover papers, receipts, deeds, etc., and an attorney's lien is set up, the proceedings should be dismissed. *Matter of McGuire* 106 App. Div. 131, 94 N. Y. Supp. 97.

This case, while decided before the amendment, illustrates the limit which is set to the jurisdiction of the court. In a discovery proceeding the decree to be made determines the right to the possession or title of property and any issue of that character may be tried. An issue as to a lien, or which involves an accounting is not pertinent, and should be tried on judicial settlement.

This proceeding cannot be used for collection of a debt, but for recovery of existing specific property. *Matter of Nay*, 6 Dem. 346, 19 N. Y. St. Repr. 259.

Where money of the deceased in the hands of a third person had been spent before the proceeding was begun — *held*, that it could not be maintained for the purpose of collecting a debt. *Matter of Stewart*, 77 Hun, 564, 60 N. Y. St. Repr. 505, 28 N. Y. Supp. 1048.

The provisions of the Code of Civil Procedure in question are designed for the purpose of discovering specific property or specific money in coin and bank bills belonging to the deceased and withheld, on which discovery they may be ordered delivered summarily, but the provisions do not contemplate the collection of a debt by summary process. *Matter of White*, 119 App. Div. 140.

The proceeding should be dismissed where it is sought to examine the officers of a bank concerning a bank deposit, as the position of the bank is that of debtor and the proceedings cannot be maintained for the purpose of examining a debtor. *Matter of Knittel*, 5 Dem. 371, 7 N. Y. St. Repr. 752.

¶ 186 *Idem*; Evidence and Competency of Witnesses.

Declarations of deceased.

In New York for many years the courts have consistently adhered to the doctrine originally laid down by the old Court of Errors in *Paige v. Cagwin* (7 Hill, 361) to the effect that the declaration of a vendor of chattels or the assignor of a chose in action made before he parted with his interest therein are not admissible against his vendee or assignee. The rule laid down in *Paige v. Cagwin* (*supra*) is subject to the exception, however,

that where the party against whom the declarations are offered claims as a representative of the person making them as an executor or administrator, or is identified in interest with him, such declarations are admissible. "The declarations of an intestate, or of a testator, touching the title to personal property, or establishing a defense to a claim asserted by the executor or administrator, or a demand against the estate he represents, are constantly received upon this ground." *Von Sachs v. Kretz*, 72 N. Y. 548, 555.

In *People v. Storrs*, 207 N. Y. 147, it was held that the declarations of deceased that he had given an automobile to his wife, were competent against his representative.

Presumption of ownership.

There is a presumption of ownership from possession which may be applied in a proper case. *Hoyt v. VanAlstyne*, 15 Barb. 568; *Wheeler v. Vandever*, 88 Hun, 233, 34 N. Y. Supp. 799, 68 N. Y. St. Repr. 721; *Halsey v. Hart*, 85 Hun, 46, 32 N. Y. Supp. 665, 66 St. Repr. 49; *Matter of Mapes*, 32 St. Repr. 786, 12 N. Y. Supp. 9; *Matter of Kellogg*, 72 Misc. Rep. 303, 131 N. Y. Supp. 203.

Evidence from possession.

Possession of the chattels of a deceased person either before or after his death is no evidence of a gift. The law presumes nothing from it. *Podmore v. Dime Sav. Bank*, 29 Misc. Rep. 393, 60 Supp. 533; aff'd, 55 App. Div. 624.

The possession should be for such a length of time that the statute of limitations has run against it. *Bayley v. Bayley*, 141 App. Div. 243, 126 N. Y. Supp. 102.

Statute of limitations.

The statute of limitations may run against the remedy of the executor or administrator six years after the death of the owner of the property. *Kelsey v. Griswold*, 6 Barb. 436; *Northrop v. Smith*, 118 N. Y. 682; *Matter of Kellogg*, 72 Misc. Rep. 303, 131 N. Y. Supp. 203.

Competency of witnesses.

That part of former section 2709 which prescribed that if a witness was examined as to a personal transaction or communication all objection to his testimony under section 829, Code Civ. Pro., was thereby waived has been repealed, as the procedure now does not contemplate another trial in another court. The rule therefore under section 829 is the same as it is in all other proceedings or trials.

Where the representative calls and examines the witness as to personal transactions with the deceased, the representative cannot then object to the same line of examination by counsel for the witness. *Matter of Benioff*, 73 Misc. Rep. 493, 133 N. Y. Supp. 413; *Matter of VanAlstyne*, 147 App. Div. 411.

Seller of article converted.

Vendor of plaintiff allowed to testify to conversation between vendee and deceased person, who it was claimed had converted the article. *Abbott v. Doughan*, 204 N. Y. 223.

Privilege of attorney.

An order adjudging an attorney guilty of contempt for refusing to disclose information about the estate of deceased is a final order. *Matter of King v. Ashley*, 179 N. Y. 281; aff'g, 96 App. Div. 143.

An attorney cannot refuse to answer on the claim of privilege (§ 835, Code Civ. Pro.) if he has derived such information from other persons or other sources. *Matter of King v. Ashley*, 179 N. Y. 281; aff'g, 96 App. Div. 143.

Costs.

The decree may award costs against the person cited where he has contested the proceeding. *De Lamater v. McCaskie*, 5 Dem. 8.

Appeal.

An appeal may be taken by a person or corporation required to pay over money or property although no answer was filed. *Matter of Carey*, 11 App. Div. 289, 42 N. Y. Supp. 346; *Matter of White*, 119 App. Div. 140, 103 N. Y. Supp. 868.

CHAPTER XXXVI.

Inventory and Appraisal; Compelling Return of Inventory

- ¶ 187. The official inventory; how made and returned; importance of duties of appraisers.
- ¶ 188. § 2665. Appointment and duties of appraisers.
§ 2666. Appraisal in different places.
- ¶ 189. § 2667. Contents of inventory.
- ¶ 190. § 2668. Return of inventory.
§ 2669. Return of inventory; how compelled.
- ¶ 191. Idem; hearing and order.
- ¶ 192. § 2670. Exemption for benefit of family.
- ¶ 193. § 2671. Proceeding to compel set-off of exempt property.

¶ 187 The Official Inventory.

Not necessary but advisable.

It is not always necessary for the representative to make an official inventory, but the cases are very few in which he can safely neglect this important protection to himself and the persons interested. Without it the representative may be at a great disadvantage when some interested person seeks to charge him with having received more property than he is accounting for, since he will have no official evidence of the kind and value of the property which has come to his hands.

Creditors, next of kin and legatees often examine the inventory in the surrogate's office, and thereby the representative is saved much annoyance in giving the information which it contains.

The possibility of a transfer tax makes such an inventory desirable and very useful upon the hearing before the appraiser.

In a few cases where one or two persons take the whole estate, and the personal estate is surely more than sufficient to pay all debts, the representative may with reasonable safety, neglect to make and file an official inventory, although in such a case he should himself take an unofficial inventory for his own information.

How made and returned; contents.

An official inventory of all the assets of the deceased is not in every case necessary, but it is generally advisable. By it the personal property which comes to the hands of the representative can be described and valued and thus the rights and interests of all interested parties and creditors duly protected. The representative has on record the extent of his liability, and the creditor and next of kin or legatee knows the amount of the estate. Such an inventory is also useful in proceedings before the transfer tax appraisers.

In some cases where there are practically no creditors and the next of kin or legatees are few and of full age, an official inventory is not considered necessary; but in all such cases the representative ought to make at once a full and complete statement of all assets for his own use and protection.

An official inventory is also of great importance as proof of title to the exempt articles which may be set off to the widow, widower or minor children, and often complications as to ownership of such specific articles arise because not so set off.

May be waived.

The statutory provisions requiring a representative to make and file an inventory may be waived by any person interested so far as his right to require it is concerned. *Matter of Barnes*, 1 Civ. Pro. Rep. 59.

Adjournment.

The taking of the inventory at the time and place named may be adjourned by the appraisers or one of them, and no further notice need be given. It may also be adjourned from one place to another when necessary to inspect and appraise different articles or classes of property.

Date as to which value shall be fixed.

The values should be fixed as of the date of death of the person whose estate is being appraised, no matter when the inventory may be taken.

Rule for valuation of estate of deceased person.

Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average price as thus found, running through a reasonable period.

§ 122, Decedent Estate Law.

Importance of the duties of appraisers.

Too little attention is sometimes given to the selection of proper persons to act as appraisers, and this is due to the fact that representatives and attorneys do not fully appreciate the importance of the duties of the appraisers.

It often happens that persons who would be entirely competent to appraise shop or factory machinery and appliances are selected to put a value on farm tools and produce; and that two men appraisers are chosen where the only property to be appraised consists of women's clothing. There is no good reason why in a proper case one or both of the appraisers should not be women, and in all cases persons should be chosen who have a fair knowledge of the value of the property which they are to appraise.

The appraisers are required to take an oath that they will fully and fairly appraise such property as may be shown them, and yet it is often found that appraisals are apparently made with very little regard to the actual value of the property, and thereby the rights of persons interested may be greatly prejudiced or destroyed altogether.

¶ 188 Appointment of Appraisers; Notice of Appraisal; Oath of Appraisers; Inventory.

Within a reasonable time after qualifying and receiving letters the executor or administrator should apply to the surrogate for the appointment of two appraisers. Such application need not

be made formally but may be made orally or by letter, and the names of two proper persons may be suggested. The surrogate must in writing appoint two disinterested persons to appraise the personal property of the deceased. The executor or administrator must then give a notice of at least five days to the legatees or next of kin residing in the county where the property is situated and by posting a notice in three of the most public places of the town, specifying the time and place at which the appraisement will be made.

Service of the notice may be either personal or by mail, and by posting a notice of the time and place of the appraisal in three public places of the town or city where the deceased resided at least five days before such appraisal. Such notice must be served on all the legatees or next of kin, according to which class is interested, who reside in the county of the decedent.

Service of the notice may be personally, or by mail, in either case 5 days before the day fixed for the appraisal.

Oath.

Before making the appraisement the appraisers must take and subscribe an oath to be annexed to the inventory that they will truly, honestly, and impartially appraise the personal property exhibited to them, according to the best of their knowledge and ability.

Appraisal.

They must in the presence of such of the parties interested as attend estimate and appraise the property exhibited to them, and set down each article separately with the value thereof in dollars and cents distinctly, in figures opposite to the articles respectively.

Return of inventory.

The inventory must be completed within three months after the representative qualifies, and be filed in the surrogate's office.

Appointment of appraisers and making inventory.

On the application of an executor or administrator, the surrogate, by writing, must appoint two disinterested appraisers, as often as may be necessary, to appraise the personal property of a deceased person. The executor or administrator, within three months after qualifying and after giving at least five days' notice personally or by mail to the legatees or next of kin, residing in the county of the decedent, and posting a notice in three public places of the town, or city where he resided, specifying the time and place at which the appraisement will be made, must make a true and perfect inventory of all the personal property of the decedent. Before making the appraisement, the appraisers must take and subscribe an oath, to be inserted in the inventory, that they will truly, honestly and impartially appraise the personal property exhibited to them, according to the best of their knowledge and ability. They must in the presence of such of the parties interested as attend, estimate and appraise the property exhibited to them, and set down each article separately with the value thereof in dollars and cents, distinctly, in figures opposite to the articles respectively. Service of the notice above mentioned may be either personal or in the manner prescribed by section 797, subdivision one and section 798 of this act.

§ 2665, Code Civ. Pro.

Effect of revision. § 2711 amended.

The provision for fees has been taken out of this section and inserted in section 2752.

Section 2666 contains authority to make inventory in different places.

Service of the notice is made personally or by mail 5 days before the day fixed for the appraisal. Mailing 5 days before, is deemed sufficient time to give proper notice, in addition to posting, to persons in the county. Under the former section personal service was usually made, at a considerable unnecessary expense in many cases.

Probably the last sentence of the section referring to service by mail should have been omitted. If no time for service by mail was specified in the section, three days would be added when served by mail under § 798.

Appraisers may be appointed as often as may be necessary and two or more sets may be appointed.

By section 2666, Code Civ. Pro., it is provided that appraisers may be appointed as often as may be necessary and if the prop-

erty is located in different or distant places two or more inventories may be made; and that if after the inventory is made other and additional property is discovered, an inventory thereof shall be made and returned within one month after such discovery.

It may not be economical or practicable to have the same two appraisers act in places widely separated or upon different occasions, so that the surrogate is given authority to appoint as many sets of appraisers as circumstances require in order to enable the representative to properly perform the duty of making proper inventories.

The surrogate cannot direct the appraisers as to the manner of the performance of their duties. *Matter of McCaffrey*, 50 Hun, 371, 20 N. Y. St. Repr. 5, 3 N. Y. Supp. 96.

An inventory taken where no notice has been given is invalid and the appraisers can be allowed no fees. *Salomon v. Heichel*, 4 Dem. 176.

Filling vacancy where appraiser refuses to serve.

If a person appointed appraiser refuses to serve another suitable person may be appointed in his place.

To accomplish this such appraiser should sign a statement that he declines or refuses to serve, which statement should be filed with the surrogate. Thereupon an order will be entered by the surrogate appointing another suitable person as appraiser in his place and stead.

Appraisal in different places; appraisal of newly discovered property.

Should any of the personal property to be inventoried be in different or distant places, the same appraisers may complete such inventory in any place where such property may be, and may adjourn the appraisal to such place; or, upon application duly made, the surrogate may appoint other appraisers to make the inventory of such unappraised property, and the same notice of such appraisal shall be given as for the local appraisal except the posting of notices.

If personal property not mentioned in any inventory come to the possession or knowledge of an executor or administrator, he must cause the same to be duly appraised, and an inventory thereof to be returned within one month after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of a first inventory.

§ 2666, Code Civ. Pro.

Effect of revision. Parts of §§ 2711, 2714 combined and rewritten.

This section now provides definitely for an inventory in different places, by an adjournment from one time and place to another. In such a case the same appraisers complete the inventory.

If it is desired to have other appraisers to act in a distant place, the surrogate may appoint other appraisers, who shall proceed, after giving the same notice, except as to posting notices, as was given by the original appraisers.

The time in which to make and return an inventory of newly discovered property has been reduced from two months to one month.

¶ 189 *Idem*; Contents of Inventory.

Contents of inventory.

The inventory must contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, known to the executor or administrator and of all debts owing by such executor or administrator to the deceased whether discharged by the will or not, with the name of the debtor in each security, the date, the sum originally payable, the amount due at decedent's death and the sum which, in the judgment of the appraisers, is collectible on each security; and of all moneys belonging to the deceased, which have come to the hands of the executor or administrator.

§ 2667, Code Civ. Pro.

Effect of revision. § 2714 amended.

This section now requires the representative to inventory any debt owing by him to the deceased, even though discharged by the will. This has always been required, but is now put into this section. See § 2668.

There is a further requirement that the inventory shall show the amount due on securities at the date of the death of decedent.

This is very desirable because the inventory can then be used upon the transfer tax hearing.

The portion of the former section referring to debts due from the representative to the deceased as assets in certain instances has been put into new section 2673, and the reference to making

an inventory of newly discovered assets has been inserted in section 2666.

Contents of inventory.

The inventory must contain a particular statement of all:

a. Bonds, mortgages, notes, and other securities for the payment of money;

b. Debts due the deceased from any executor or administrator;

c. Debts due the deceased from an executor or other person, although the same may have been discharged by the terms of the will:

d. All money, and if there is none that fact should be stated.

It shall contain the name of the debtor in each security, the date, the sum originally payable, the interest due thereon to the date of death of deceased, and the estimated value of such security at the date of such death.

Separate and further inventories.

If there is property in different and distant places two or more separate inventories may be made.

If personal property not mentioned in any inventory comes to the knowledge or possession of an executor or administrator he must cause the same to be appraised and an inventory thereof to be returned within two months after the discovery thereof.

Partnership assets pass to the surviving parties and should not be inventoried except as an estimated balance due from the firm. *Thomson v. Thomson*, 1 Bradf. 24; followed in 9 Civ. Pro. 231. See ¶ 199.

The estimate of values placed in the inventory are *prima facie* evidence of such values. *Matter of Maack*, 13 Misc. Rep. 368, 35 N. Y. Supp. 109, 69 N. Y. St. Rep. 483; *Matter of Shipman*, 82 Hun, 108, 31 N. Y. Supp. 571, 64 N. Y. St. Rep. 161.

A direction in a will that a certain method should be pursued in taking inventory will not be enforced, and may be disregarded by the executor. *Brainard v. Birdsall*, 2 Dem. 331.

What are "assets" is shown at paragraph 195.

Inventory of perishable and other property which may have been sold or disposed of.

In case where it has been necessary to dispose of perishable property at once, it is apparent that such property cannot be exhibited to the appraisers. In such a case if the appraisers have been selected in time they may view such property before its sale and appraise it, and they would then be justified in including it in the final inventory when the same is made.

If such course is not pursued the representative should himself take an inventory of such property and make an estimate of its value and then the facts regarding the same may be set up in the official inventory.

If the making of the inventory is delayed so that any other classes of personal property have been disposed of and a similar statement thereof can be furnished by the representative, the same course may be pursued.

If, however, no memoranda of such articles have been kept the same of course cannot be appraised by the appraisers and the representative may be called upon to account for such property and be made liable therefor on his judicial settlement.

An inventory must include all personal property of the deceased whether situated in this State or elsewhere, or whether it can be viewed and handled by the appraisers. *Matter of Butler*, 38 N. Y. 397.

¶ 190 Inventory Must be Verified and Filed; Proceeding to Compel Return of Inventory.**Return of inventory.**

Duplicates of the inventory must be made and signed by the appraisers, one of which must be retained by the executor or administrator, and the other filed in the surrogate's office within three months from the date of the letters. On returning such inventory, the executor or administrator must take and subscribe an oath, indorsed upon or annexed to the inventory, stating that the inventory is in all respects just and true, that it contains a true statement of all the personal property of the deceased which has come to his knowledge, and particularly of all money belonging to the deceased, and of all just claims of the deceased against him, according to the best of

his knowledge. Any one executor or administrator, on the neglect of the others, may return an inventory; and the executors or administrators so neglecting shall not thereafter interfere with the administration or have any power over the personal property of the deceased; but the executor or administrator so returning the inventory shall have the whole administration, until the delinquent return, and verify an inventory in accordance with the provisions of this article.

Former § 2715.

§ 2668, Code Civ. Pro.

The inventory must be

(a) Made in duplicate, one retained by the representative and the other filed with the surrogate within three months from the date of letters;

(b) Each duplicate signed by the appraisers;

(c) Each duplicate have upon it or annexed to it the oath of the representative signed by him containing the statements set out in the section 2668.

(d) Any one representative, on the neglect of his co-representative may make and return the inventory;

(e) The representative so neglecting to make and return an inventory or join with another forfeits his right to participate in the duties of administration while such default continues.

Return of inventory; how compelled.

A creditor, coexecutor or coadministrator, or person interested in the estate may present to the surrogate's court a petition showing that an executor or administrator has failed to return an inventory, or a sufficient inventory, within the time prescribed by law therefor. If the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory, or in default thereof, to show cause at a time and place therein specified, why he should not be removed or punished. On the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate may revoke his letters, or issue a warrant of arrest against him, on which the proceedings are the same as on a warrant issued for disobedience to an order, as prescribed in article one of title twelfth of chapter seventeenth of this act. A person committed to jail on the return of a warrant of arrest issued as prescribed in this section, may be discharged by the surrogate or a justice of the supreme court, on his paying and delivering, under oath, all the money and other property of the decedent, and all papers relating to the estate under his control, to the surrogate, or to a person authorized by the surrogate to receive the same.

§ 2669, Code Civ. Pro.

Effect of revision. § 2716 amended.

The section now mentions a co-executor or co-administrator as one of the persons who may make the application.

Such application must be by petition, and if the respondent fails to make and return an inventory he may be removed, or his letters revoked, or he may be arrested and imprisoned.

Order to show cause.

The order to return the inventory or show cause must be made as a result of a judicial determination by the surrogate and must be signed by the surrogate.

Return of the inventory; how compelled; warrant of attachment for failure to make return and imprisonment therefor; how discharged.

A creditor or person interested in the estate may present to the Surrogate's Court proof, by affidavit, that the executor or administrator has failed to return the inventory, or a sufficient inventory, within the time prescribed by law therefor.

If the surrogate is satisfied that the executor or administrator is in default he must make an order requiring the delinquent to return the inventory or in default thereof, to show cause why he should not be removed or punished.

Warrant of arrest may be issued.

On the return of the order, if the delinquent has not filed a sufficient inventory the surrogate must issue a warrant of arrest against him on which the proceedings are the same as on a warrant issued for disobedience to an order as prescribed in article one of title 12 of chapter 17 of the Code of Civil Procedure.

Personal service.

Personal service of the order must be made by delivering a certified copy, and the representative must appear in person. An appearance by an attorney without personal service does not satisfy the requirements of this section read with § 2533, Code Civ. Pro. (¶ 30). *Matter of Barnes*, 1 Civ. Pro. R. 59.

The original order remains on file in the surrogate's office, but a certified copy may be procured and served, which is the method of serving a decree or order. See ¶ 34.

Discharge from imprisonment.

A person committed to jail on the return of a warrant of attachment may be discharged by the surrogate or a justice of the Supreme Court on his paying and delivering under oath the property of the deceased and all papers relating to the estate under his control to the surrogate or to a person authorized by the surrogate to receive the same.

Application must be made by person interested.

The early cases holding that the filing of an inventory is a general duty imposed upon all executors and administrators are *Thomson v. Thomson* (1 Bradf. 24 [1849]); *Cotterell v. Brock* (id. 148 [1850]); *Forsyth v. Burr* (37 Barb. 540 [1862]); *Creamer v. Waller* (2 Dem. 351 [1884]). Other and later decisions may be found to the same effect, but they all rest on the cases decided by Surrogate Bradford in 1849 and 1850, without discussion as to the reasons for the rule. Surrogate Bradford discusses the practice of the English ecclesiastical courts, which was, of course, based on special powers belonging to them not at all applicable here, and rests his decision on a provision of the Revised Statutes then in force. This provision of the law was repealed when the Code of Civil Procedure took effect, on September 1, 1880, but it does not seem to have been noticed that these early cases were thus rendered obsolete. The power of control by a surrogate over executors and administrators is, by the Code of Civil Procedure, required to be "exercised in the cases, and in the manner prescribed by statute." Section 2510, Code Civ. Pro. Section 2716 (now § 2669), Code Civ. Pro., prescribes the only cases in which the filing of an inventory may be compelled, and it can now only be done on the application of "a creditor or person interested in the estate." The purpose of filing an inventory is to give information to the parties having interest in the assets. Even if a discretionary power could be spelled out from the statute, to require the exhibition of the affairs of the estate on the request of a person holding an unproved and disallowed demand, such discretion should be exercised only where

the surrogate is satisfied that the claim is probably meritorious, and that the opposition to it is vexatious and probably unreasonable. *Matter of Huntington*, 39 Misc. Rep. 477, 80 N. Y. Supp. 220.

Alleged creditor.

An allegation of interest is sufficient although disputed. § 2768, subd. 11, Code Civ. Pro.

The applicant must be a creditor, and it is not sufficient to allege that at one time he was a partner of deceased, and that such firm or its legal representative is a creditor. *Pendle v. Waite*, 3 Dem. 261.

It has been questioned whether the attorney for a creditor could make the petition in his own name. *Matter of Lowenthal*, 148 App. Div. 487, 132 N. Y. Supp. 994.

¶ 191 Idem; Hearing and Order.

Where the representative denies the petition.

By the former statute authorizing the surrogate, in case of the neglect of the executor or administrator, to require him to appear and return an inventory, etc., there was no provision made for the amendment of an inventory, but in *Sheldon v. Bliss* (8 N. Y. 31), it was held that the surrogate might require the inventory to be amended where the executor had made no exemption of articles for the use of the widow. It was held in *Thomson v. Thomson* (1 Bradf. 24, 31), that while the court might order an inventory to be amended, if the answer confess more assets, yet if such further assets shall not be admitted, proof will not be received to contradict the answer, and the reason of this rule is stated that the inventory is required by law to be under oath, and that the court cannot order assets to be inserted in the inventory without the parties' oath, nor can it compel an executor or administrator to swear to assets, possession of which he has twice already denied, viz.: on the inventory, and then in the answer denying the allegations; and the conclusion in that case was, that

if there was any error in the inventory, it must await correction on accounting by the representative of the estate.

Thus stood the law until the present Code went into effect, which, by section 2716 (now § 2669), Code Civ. Pro., expressly provides, that the surrogate, on a proper application, may require the executor or administrator to return an inventory, or further inventory, and the question is whether this makes any substantial change of the law, as it had been wisely adjudged by Surrogate Bradford. From the nature of the proceeding and reason also, it seems that the special authority of the surrogate, conferred by that section, to cause a further inventory does not change the authority of the court in respect to it, but only makes special provision for what had been adjudged to be a necessary implication of authority.

The surrogate has no power to require any examination of the parties or witnesses, for the purpose of testing the correctness of the inventory filed; and that any errors therein must be corrected on a future accounting; for the impropriety of requiring the representative of an estate to verify an inventory, which, in effect, he has twice sworn is not true, is as applicable to proceedings under the new Code as under the former statute. *Matter of McIntyre*, 4 Redf. 489.

Upon an application to amend inventory or file further inventory and include certain property therein, if the representative denies that such property was the property of the deceased, the surrogate has no power to determine the question in that proceeding, and the application should be denied. *Greenhough v. Greenhough*, 5 Redf. 191.

Where the administrator claims title to the property sought to be added to the inventory, that question will not be tried, except upon judicial settlement. *Matter of Goundry*, 57 App. Div. 232, 68 N. Y. Supp. 155.

Where the representative denies the allegation upon which further inventory is asked, the surrogate will not direct such further inventory, but leave the questions to be determined upon

the final accounting. *Thompson v. Thompson*, 1 Bradf. 24; *Matter of Arbogast*, 9 Civ. Pro. 231, 4 Dem. 399.

A positive affidavit, uncontradicted, that there is no property of the estate, is sufficient to authorize the surrogate to deny the application. *Matter of Lowenthal*, 148 App. Div. 487, 132 N. Y. Supp. 994.

Settlement alleged.

Where answer is made to the petition that the petitioner has no interest in the estate by reason of the same having been extinguished and satisfied by a settlement, the surrogate should dismiss the petition. *Matter of Wagner*, 119 N. Y. 28; aff'g, 52 Hun, 23, 22 N. Y. St. Repr. 208.

Where there has been a lapse of thirty years between the granting of letters and the application to compel the filing of an inventory, such request will be refused on the ground that it is presumed that the estate has been settled. *Thompson v. Thompson*, 1 Bradf. 24.

When required.

An unverified list of decedent's assets is not an inventory, and an official inventory can be required, even though the assets can no longer be submitted to the appraisers for inspection. The estate consisted of money. *Loeche v. Griffin*, 3 Dem. 358.

An inventory may be ordered of money and other like property situated in another State, even though it may not be produced before the appraisers. *Matter of Butler*, 38 N. Y. 397.

An administrator may be directed to file an inventory, even though the articles of property have been disposed of and cannot be actually inspected. *Silverbrandt v. Wedmayer*, 2 Dem. 263; 4 Redf. 144, overruled; 38 N. Y. 397, followed.

Refusal to obey order.

In case of refusal to obey the order the representative may be committed to jail. *Potter v. McAlpine*, 3 Dem. 108, 128.

¶ 192 *Idem*; Appraisers Should Set off Exempt Property for the Benefit of the Family.

Exemption for benefit of family.

If a person having a family die, leaving a widow or husband, or minor child or children, the following articles shall not be deemed assets, but must be included and stated in the inventory of the estate as property set off to such widow, husband or minor child or children:

1. All housekeeping utensils, musical instruments, sewing machine and household furniture used in and about the house and premises, fuel and provisions, and the clothing of the deceased, in all not exceeding in value five hundred dollars.

2. The family bible, family pictures and school-books, used by or in such family, and books not exceeding in value fifty dollars, which were kept and used as part of the family library.

3. Domestic animals with their necessary food for sixty days, not exceeding in value one hundred and fifty dollars.

4. Money or other personal property not exceeding in value one hundred and fifty dollars.

Such property so set apart shall be the property of the surviving husband or wife, or of the minor child or children if there be no surviving husband or wife. No allowance shall be made in money or other property under subdivisions one, two and three if the articles mentioned therein do not exist.

§ 2670, Code Civ. Pro.

Effect of revision. § 2713 amended.

There has been a radical change in the language of this section, but in its practical application it will not differ much from the former section.

The much discussed construction of allowing money in lieu of articles not possessed by the deceased is settled by the last sentence.

The allowance of articles not exceeding in value \$500 under subdivision 1 includes the three different classes of property allowed under the former section, and in small estates will amount to no more than was formerly allowed. All of such articles must be appraised, while under the former section most of them were set off without having a value placed upon them.

In the next to the last sentence, the ownership of such property is fixed, instead of being so left as in the former section, that such ownership was often a subject of contention.

Reason for this statute.

The reason for the statute is found in the hardship which would result if immediately upon the death of a husband the contents of the home should pass to the representative and the widow become homeless.

While the courts should construe the law liberally in the interest of the widow, yet they should not attempt a construction not fairly within the language of the section.

Title to exempt property. Decided under former § 2713.

Under these statutes, the title of the widow to such exempt property, where there is no minor child, is absolute on the death of her husband, not only as against creditors and next of kin, but as against legatees, subject only to the right of the administrator or executor, to take possession of the property for the purpose of including and stating it in the inventory. *Fox v. Burns*, 12 Barb. 677; *Voelckner v. Hudson*, 1 Sandf. 215; *Sheldon v. Bliss*, 4 Seld. 31. In the latter case, the husband of the plaintiff made his will, thereby giving her an annuity, and the residue of his property to other persons. The executors failed to set apart for the widow what the statutes allow her, but sold the whole estate, real and personal, and the court held that the proceeds of the sale of the personal property constituted a trust, in the hand of the executors, in favor of the widow, to the extent of her interest in or claim upon the property of the testator under the statutes; thus, notwithstanding the testator made other disposition of the property in question, affirming her right to it, under the statutes, as against the legatees as well as the creditors.

The effect of these statutes is, then, to give to the wives of persons owning personal property of the character specified therein a contingent interest in so much thereof as the statutes specify, dependent only on their surviving their husbands, and the property remaining undisposed of by the husbands while living. *Vedder v. Saxton*, 46 Barb. 188.

The section construed.

“Family.” Where a husband and wife did not live together, the husband did not keep house nor pay board for his daughter or wife — *held*, that he had a family under section 2713, Code Civ. Pro. *Matter of Shedd*, 60 Hun, 367, 38 N. Y. St. Repr. 310, 14 N. Y. Supp. 841; *aff’d*, 133 N. Y. 601.

A man has a family who has a wife but no children. *Kain v. Fisher*, 6 N. Y. 597.

“Statutory allowances” include exempt property to be set off to a widow, but do not include a distributive share. *Matter of Mersereau*, 38 Misc. Rep. 208, 77 N. Y. Supp. 329.

Where the widow is also sole executrix, it is proper to defer making the set-off until the judicial settlement. *Matter of Warner*, 53 App. Div. 565, 65 N. Y. Supp. 1022.

The direction is mandatory if the property exists, and the discretion of the appraisers only goes to the nature of the property and its value. *Matter of Bidgood*, 36 Misc. Rep. 516, 73 N. Y. Supp. 1061.

Exempt property not assets.

Where the deceased left \$50 in money and the same was set off to the widow, it could not be taken to pay funeral expenses. *People ex rel. Brown v. Prendergast*, 146 App. Div. 713, 131 N. Y. Supp. 441.

Fuel and provisions.

The amount of fuel and provisions is not now limited to those necessary for sixty days’ support, but they must be taken as part of the property of the value of not to exceed \$500.

Where there are provisions and fuel on hand that can be set off by the appraisers, the widow and minor children are entitled to the same. This is the only support the widow would be entitled to unless the deceased left real estate in which the widow had a dower right, in which case, and in which case only, the widow is entitled to sustenance for forty days. See ¶ 310.

If such articles do not exist no money allowance should be made in lieu thereof.

If the appraisers fail to set off articles for sustenance which do exist, on judicial settlement their value may be ordered paid to the widow. *Matter of Griffith*, 49 Misc. Rep. 405, 110 N. Y. Supp. 215.

Household furniture.

The circumstances of the case will govern to a great extent the meaning of the words "household goods" or "household furniture." Under ordinary circumstances they would cover that which is ordinarily known as furniture, and would include carpets, kitchen utensils, household linen, china, bric-a-brac, pictures hung up for decoration, clocks, and articles of a like nature; not books in the library, but would include a book or books of recipes which are in use in the kitchen, not such books if they are simply part of a library.

In Jarman on Wills, vol. I, p. 669 (q), the words "household goods" or "furniture" are so construed, but the words "household effects" would include all of the foregoing, and have been held to include also books, wines and liquors, apparatus for turning models, pictures, organ.

In Underhill on Wills, page 423: "A gift of household furniture and articles of domestic or personal use and ornament will carry a telescope and books."

A piano may be classed as household furniture and be set off as part of the household furniture. *Matter of Allen*, 36 Misc. Rep. 398, 73 N. Y. Supp. 750.

Where there are not enough articles of household furniture to amount in value to \$500, cows and other property cannot be set off to make up the deficiency. *Matter of Griffin*, 118 App. Div. 515, 103 N. Y. Supp. 345.

Estate less than value of exempt property.

Estate of less than \$150 — *held*, that the whole estate vested absolutely in the widow and that she could maintain an action of conversion against the administrator, before filing of inventory. *Crawford v. Nassoy*, 173 N. Y. 163; rev'g, 55 App. Div. 433, 67 N. Y. Supp. 108.

Part ownership in article.

In the case of *Baucus v. Stover* (24 Hun, 109), the surrogate had made a money allowance to the widow in place of ten sheep and two swine that the deceased did not possess, and the General Term of this Department held that such allowance was improperly made, although the deceased had a half interest in such animals, the court saying: "The statute contemplates such an ownership and possession of this property in the deceased, or his personal representative, at the time of making up of the inventory, as will permit their delivery to the widow at least potentially. Here the testator had but a half interest in these animals. They could not be then delivered over to the widow, even potentially and, therefore, could not be set off to her." This case was reversed (89 N. Y. 1), but the only question argued was an entirely different one.

While the question does not often arise, because there is usually enough property to set off to satisfy the statute, yet the surrogates have generally followed *Baucus v. Stover*, until the Court of Appeals had the question squarely up, and overruled the doctrine in *Baucus v. Stover*, holding as follows:

When the decedent has not the absolute ownership of enough personal property to set off to the family the property called for by the statute, property in which the deceased had a part ownership may be set off to the extent that the deceased had an interest therein. *Matter of Hallenbeck*, 195 N. Y. 143.

Right to set-off may be waived.

An agreement provided for the payment of \$1,500 in full satisfaction of the widow's dower in either real or personal estate — held to bar the widow from having set off to her the articles specified in section 2713 (now § 2670), Code Civ. Pro. *Young v. Hicks*, 92 N. Y. 235; aff'g, 27 Hun, 54.

By acceptance of provision in will.

The widow will be held to waive her right to set-off where she accepts a provision in the will expressed to be in lieu of dower

and also of all statutory allowance. *Matter of Mersereau*, 38 Misc. Rep. 208, 77 N. Y. Supp. 329.

By express waiver before appraisers.

A widow may waive her right to a set-off by making such a statement before the appraisers. *Matter of Campbell*, 48 Misc. Rep. 278, 96 N. Y. Supp. 768.

Where the widow was one of two administrators and the inventory returned by them jointly did not set-off to the widow the exempt articles, in the absence of any express waiver — *held*, that she would not be adjudged to have waived. *Matter of Hulse*, 41 Misc. Rep. 307, 84 N. Y. Supp. 220.

A husband held to have waived his rights by refusing to accept the set-off when tendered by the executor. *Matter of Campbell*, 96 App. Div. 561, 89 N. Y. Supp. 569.

When statutory allowance not waived by accepting provision of will.

This statutory provision, Code Civ. Pro., § 2713 (now § 2670), in favor of the widow holds good and must be respected, though the husband by his will make other provisions for her, which are not specified to be in lieu of her exemptions, and even though he dispose of all of this personal property. *Matter of Frazer*, 92 N. Y. 239, 246; *Hatch v. Bassett*, 52 id. 359, 362; *Vedder v. Saxton*, 46 Barb. 188; *Shipman v. Keyes*, 127 Ind. 353; *Matter of Harris*, 2 Conn. 4.

The court, in speaking of the widow's exemptions in the latter case, said: "It has been held that this class of property forms no part of the estate as a subject of bequest. The testator could no more divest his widow of it by will than he could her dower in real estate."

Neither the widow's quarantine nor these exemptions come to the widow by way of descent or distribution. They are provisions having for their primary object the temporary relief of a widow, and, strictly speaking, they may be termed "statutory allowances." *Matter of Mersereau*, 38 Misc. Rep. 208.

A husband cannot divest his widow of the rights under this

section by any provision of his will in lieu of dower, or by any other provision which is not expressed to be in lieu of the statutory provision, and, therefore, her acceptance of any such provision is not a waiver of her right. *Vedder v. Saxton*, 46 Barb. 188.

¶ 193 Proceeding to Compel Set-off of Exempt Property.

Where an executor or administrator has failed to set apart property for a surviving husband, wife or child, as prescribed by law, the person aggrieved may present a petition to the surrogate's court, setting forth the failure and praying for a decree, requiring such executor or administrator to set apart the property accordingly; or, if it has been lost, injured or disposed of, to pay the value thereof, or the amount of the injury thereto, and that he be cited to show cause why such a decree should not be made. If the surrogate is of the opinion that sufficient cause is shown, a citation shall issue accordingly. In a proper case, the decree may require the executor personally to pay the value of the property, or the amount of the injury thereto.

§ 2671, Code Civ. Pro.

Effect of revision. § 2724 amended.

The provision for awarding a set-off of exempt property on judicial settlement has been inserted in section 2735. See ¶ 441.

Proceedings to obtain set-off of exempt property; petition.

The petition must be made by the party aggrieved and must set forth the failure to set off such property.

Prayer of petition.

The petition should ask for a decree

a. Requiring such representative to set apart the property accordingly, or

b. Requiring the representative to pay the value thereof or the amount of the injury thereto, if the property has been lost, injured or disposed of.

c. That a citation to show cause be issued. If the surrogate is satisfied that there are good grounds for the application a citation must issue accordingly.

Decree.

On the return of the citation the surrogate must make such a decree as justice requires.

In a proper case the decree may require the representative personally to pay the value of the property or the amount of the injury thereto.

It seems to be a question whether the representative of a deceased husband or wife can maintain the proceeding under this section. *Matter of Campbell*, 96 App. Div. 561, 89 N. Y. Supp. 569.

CHAPTER XXXVII.

What Property Constitutes Assets, and Goes to the Representative

- ¶ 194. Duty to ascertain assets.
Deposits in bank in trust for others.
- ¶ 195. § 2672. What shall be deemed assets.
- ¶ 196. Property and rights held not to constitute assets.
- ¶ 197. § 2359. Property not assets in the first instance.
§ 2673. Debt due from executor to testator.
- ¶ 198. Proceeds of insurance policies.
- ¶ 199. Partnership property.
- ¶ 200. Accounting and settlement by partners.
- ¶ 201. Continuing partnership business.
- ¶ 202. Partnership debts.

¶ 194 Examination to Determine Whether Property is or is Not Assets of the Estate of the Deceased.

The representative should make a careful examination of the property of the deceased which comes to his hands to ascertain whether or not it is in fact the property of the deceased or property of some other person in his possession.

It is not always safe to assume that all of the property in sight about a place, store, farm, or house is the property of the deceased. It may never have been his or it may be fully covered by a chattel mortgage or other lien and sometimes securities known to be owned by the deceased will be found to be pledged as collateral. If the representative has not fully informed himself as to these matters he may consider that the deceased left more than sufficient property to pay his debts and may make the mistake of beginning to pay debts and find later that there is not sufficient assets to pay all debts in full.

The representative must also bear in mind that certain property which may aggregate more than \$500 in value may be required to be set off to the surviving husband, widow, or minor children

and, therefore, to the extent of such set-off be taken from the apparent assets of the estate.

Where a will is left there may be specific bequests of property, which property will not be assets in the first instance, and which will be turned over to the legatee. There may also be created a trust fund composed of certain named securities, which property will also be turned over to the trustee without being converted by the executor, and which will not be liable for debts until other property is exhausted. *Matter of Ryer*, 94 App. Div. 449, 88 N. Y. Supp. 52, aff'd, 180 N. Y. 532.

Securities, bank-books, and other personal property in the possession of the deceased, even though claimed by others should be treated as assets.

All securities, bank-books, and other personal estate and evidences of indebtedness which come to the possession of the representative should be treated as assets of the deceased, even though claimed by others, unless such right is clear and unmistakable. Even then it is better to produce such property before the appraisers and take their decision upon the matter, before delivering it to the claimants. If there is any fair question about the right of such person to the property, it should be retained until the rights of all parties are determined in court.

Where an administrator finds in the safe-deposit box of the deceased securities which are claimed as the property of another, the surrogate has no jurisdiction to make an order that they be turned over to such claimant. *Case v. Spencer*, 86 App. Div. 454.

Revocable and Irrevocable Deposits in Bank in Trust for Others.
See ¶ 427.

Deposits in trust in banks are not testamentary trusts, but are to be considered upon the question as to whether the money represented by such deposits is assets going to the representative, or whether the title has passed to the beneficiary named in the bank books, or whether a trust has been created between the parties so that the title to the money passes by reason thereof to the person named in the book.

The form of the deposit often varies and the effect depends largely upon the wording upon the bank book.

Provisions of the banking law regarding deposits in trust, in trust companies.

Deposits of minors and trust deposits and deposits in the names of more than one person.

When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such minor, and free from the control or lien of all other persons, except creditors, and shall be paid, together with the interest thereon to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the corporation. When any deposit shall be made by any person describing himself in making such deposit as trustee for another and no other or further notice of the existence and terms of a legal and valid trust than such description shall have been given in writing to the company in the event of the death of the person so described as trustee, such deposit or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the deposit was thus stated to have been made. When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made, by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the life time of both, or to the survivor after the death of one of them; and such payment and the receipt or acquittance of the one to whom such payment is made, shall be a valid and sufficient release and discharge to said company, for all payments made on account of such deposit prior to the receipt by said company of notice in writing signed by any one of such joint tenants, not to pay such deposit in accordance with the terms thereof.

§ 198, Banking Law.

A similar section applying to banks is found in section 148 of the Banking Law.

Deposit in trust not a testamentary disposition.

The fact that the money or property was to go to the beneficiary only at the death of the maker of the trust or deposit does not make it a testamentary disposition, the interest of the claimant being vested at time of the deposit. *Grafing v. Heilman*, 1 App. Div. 260, 261, 72 N. Y. St. Repr. 755; *Van Cott v. Prentice*,

104 N. Y. 45; *Durland v. Durland*, 83 Hun, 174, 64 N. Y. St. Repr. 149; *Carnwright v. Gray*, 127 N. Y. 93; *Hegeman v. Moore*, 131 id. 462.

May be defeated by will.

In certain cases where the deposit was for convenience of depositor and no declaration of trust was made, it has been held that a gift of the deposit by will amounted to a revocation. *Thomas v. Newburgh Savings Bank*, 73 Misc. Rep. 308.

Effect of by-laws printed in pass-book.

A by-law printed in the pass-book to the effect that payment to the person who presents the book shall be valid is a protection to the bank while the depositor is living; and where the same book contains a by-law that on the decease of a depositor payment will be made to the legal representative, the former by-law is not a protection. *Mahon v. Brooklyn Sav. Inst.*, 175 N. Y. 69, aff'g, 67 App Div. 619.

An officer must be ordinarily careful and competent in comparing signatures. *Appleby v. Erie C. Sav. Bank*, 62 N. Y. 12.

A rule of the savings bank that the bank shall not be liable for payment of a deposit to a wrong person who presents its books, but agreeing to use its best efforts, does not relieve it from liability when it pays to a person of a different sex from the depositor. *Allen v. Williamsburg Sav. Bank*, 69 N. Y. 314.

The owner of a bank-book is entitled to draw the deposit, even though the bank has a by-law that no one but the depositor can draw without an order or power of attorney. *Ridden v. Thrall*, 125 N. Y. 572.

Power of attorney or order to draw.

Power of attorney to draw deposit is revoked by the death of depositor, and bank before paying is bound to make inquiry as to life of depositor. *Hoffman v. Union Dime Sav. Inst.*, 95 App. Div. 329, rev'g, 41 Misc. Rep. 517.

An order on the bank given to the husband directing a change

in the wife's account is revoked by her death before the bank acts upon it. *Augsbury v. Shurtliff*, 180 N. Y. 138; *Hallenbeck v. Hallenbeck*, 103 App. Div. 107.

The trust may be irrevocable.

Where there is evidence which establishes an irrevocable trust, the case is to be distinguished from *Matter of Totten* (179 N. Y. 112). *O'Brien v. Williamsburg S. B.*, 101 App. Div. 108.

The trust being irrevocable it carries with it an accumulation of interest. *Matter of King*, 51 Misc. Rep. 375.

Deposit of wife's money by her husband in trust for girl they were bringing up, made in the presence of the girl, and after a family discussion and determination to thus provide for her. The deposit was increased, and afterward withdrawn by the depositor — held a valid trust not only for original deposit but for the amount on deposit at the time of withdrawal. *Farleigh v. Cadman*, 159 N. Y. 169, rev'g, 11 App. Div. 628.

Deposit, H. P. C. in trust for F. H. H. Pass-book retained by the bank with a paper signed by the depositor declaring her intention and fixing date of payment — held a valid trust. *Robinson v. Appleby*, 69 App. Div. 509; aff'd, without opinion, 173 N. Y. 626.

The trust may be revocable.

The rule as established by *Matter of Totten* (179 N. Y. 112) now is: A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

Death of beneficiary before that of depositor.

Deposit in trust for son who dies before the depositor does not go to the son's estate. *Matter of U. S. Trust Co.*, 117 App. Div. 178.

Where a depositor made a deposit in the maiden name of her sister, she having been married thirty years, and she died — *held* no trust intended. *Garvey v. Clifford*, 114 App. Div. 193.

Where the beneficiary dies before the depositor, no trust. *Matter of Barefield*, 177 N. Y. 387; *rev'g*, 82 App. Div. 463; *Cunningham v. Davenport*, 147 N. Y. 43; *Matter of Bulwinkle*, 107 App. Div. 331.

Where beneficiary to take the fund after death of depositor is named.

Certificate of deposit stated that in event of death of depositor payment should be made to her niece — *held* not a valid gift or trust. *Sullivan v. Sullivan*, 161 N. Y. 554; *aff'g*, 39 App. Div. 99.

Notice to beneficiary.

Taking the beneficiary to the bank when the deposit was made and handing over the book after making the deposit, was held to be notice. *Matthews v. Brooklyn Sav. B.*, 151 App. Div. 527.

“The finding of the pass book in the safe deposit vault of the beneficiary necessarily implies that there was notice by the depositor of the trust to the beneficiary. Inasmuch as notice to the beneficiary is one of the examples of an unequivocal act or declaration by which the depositor completes the gift, used by the Court of Appeals to illustrate the rule, we must hold that the notice to William H. Davis completed his wife's gift to him and rendered the trust irrevocable.” *Matter of Davis*, 119 App. Div. 35.

Who may be trustee.

A third person may be designated as trustee, and if he undertakes the trust he will be held to its faithful performance according to the intention of its creator. *Mann v. Shrive*, 111 App. Div. 452.

Deposit in trust and transfer of stocks in trust in name of third person who dies may be a tentative trust and come under the rule in the *Totten* case. *Lattan v. Van Ness*, 107 App. Div. 393; aff'd, 184 N. Y. 601.

The creator of the trust may himself become the trustee.

A trust of personal property may be effectually formed in which the author of the trust is himself the trustee. *Locke v. F. L. & T. Co.*, 140 N. Y. 135; *Van Cott v. Prentice*, 104 id. 45; *Barry v. Lambert*, 98 id. 306; *Millard v. Clark*, 80 Hun, 142, 61 N. Y. St. Repr. 633, 29 N. Y. Supp. 1012.

Evidence to Establish the Trust.

Evidence of declarations.

In an action to recover deposits made in trust for two sons of the depositor, where it is alleged that the names of such sons were fictitious, evidence of declaration of the depositor that she had no sons is admissible. *Washington v. Bank for Savings*, 171 N. Y. 166; aff'g, 65 App. Div. 338.

Declaration of deceased not part of *res gestæ* and not in presence of plaintiff or any one representing her not competent to disprove gift. *Vaughn v. Strong*, 34 N. Y. St. Repr. 564; *Kelley v. Home Sav. Bank*, 103 App. Div. 150.

But they are competent to show and publish intent. *Hurlburt v. Hurlburt*, 128 N. Y. 425.

The intent can be strengthened by acts and declarations of the depositor in his lifetime amounting to a publication of his intent. *Lee v. Kennedy*, 54 N. Y. Supp. 155.

Declarations made after the deposit tending to show that the depositor used the name of the other person for convenience, are not admissible. *Tierney v. Fitzpatrick*, 195 N. Y. 433; rev'g, 122 App. Div. 623.

Incompetency of evidence.

The case of *Carey v. White* (59 N. Y. 336) and *Simmons v. Havens* (101 id. 427) have been limited in their application to

this extent that all conversations or transactions between persons since deceased and a third party in the presence or hearing of the witness may not be testified to by the witness if he by word or sign participated in the transaction or conversation or is referred to in the course of it or was in any way a party to it. *Hutton v. Smith*, 175 N. Y. 382; aff'g, 74 App. Div. 284, 77 N. Y. Supp. 523.

Evidence of one claimant in behalf of others is competent. *Jones v. Thomas*, 76 App. Div. 596, 79 N. Y. Supp. 111; *Meislahn v. Meislahn*, 56 App. Div. 566, 67 N. Y. Supp. 480.

Intent must be shown.

Whether or not a trust is created depends upon the intention of the depositor, and that is a question of fact to be determined in each case. *Haux v. Dry Dock S. I.*, 2 App. Div. 165, 73 N. Y. St. Repr. 45; aff'd, 154 N. Y. 736.

To constitute a trust there must be either an explicit declaration of trust or circumstances which show beyond a reasonable doubt that a trust was intended to be created. *Beaver v. Beaver*, 117 N. Y. 421.

Where an intended gift fails for want of delivery the court cannot supply such a defect by construing the transaction as a trust. *Young v. Young*, 80 N. Y. 422; *Matter of Crawford*, 113 id. 560.

Knowledge by beneficiary is not necessary.

The beneficiary need not know that a trust has been established in his favor. *Martin v. Martin*, 46 App. Div. 44, 61 N. Y. Supp. 813; *Van Cott v. Prentice*, 104 N. Y. 46; *Martin v. Funk*, 75 id. 137.

Depositor may hold book or property.

The fact that the book or property remained in depositor's possession and was found among his assets, by his executor, does not matter. *Martin v. Martin*, 46 App. Div. 445; *Willis v. Smith*, 91 N. Y. 277, 300; *Martin v. Funk*, 75 id. 137; *Barry v. Lam-*

bert, 98 id. 307; *Williams v. Brooklyn Sav. Bank*, 51 App. Di 334; *Grafing v. Heilman*, 1 id. 260; aff'd, 153 N. Y. 673; *Robertson v. McCarthy*, 54 App. Div. 103.

While the retention of a bank-book may be inimical to the position that there was a gift by the decedent, it does not contravert a trust. It is an act in harmony with his control of the property; *Martin v. Martin*, 46 App. Div. 447; *Van Cott v. Prentice*, 10 N. Y. 45; *Locke v. T. L. & T. Co.*, 140 id. 135.

Trustee drawing interest.

The fact that U. drew the interest on the deposit did not change or affect the character that she had given it as a trust fund; *Willis v. Smith*, 91 N. Y. 298; *Martin v. Funk*, 75 id. 137; *Grafing v. Heilman*, 1 App. Div. 260, 72 N. Y. St. Repr. 755; aff'd, 153 N. Y. 673.

¶ 195 What Property Passes to the Representative as Asset What shall be deemed assets.

The following shall be deemed assets and go to the executors or administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory:

1. Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person.

2. The interest remaining in him, at the time of his death, in a term of years after the expiration of any estate for years therein, granted by him or any other person.

3. The interest in lands devised to an executor for a term of years for the payment of debts.

4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support.

5. The crops growing on the land of the deceased at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered.

7. Rent reserved to the deceased which had accrued at the time of his death.

8. Debts secured by mortgages, bonds, notes or bills; accounts, money, and bank bills, or other circulating medium, things in action, and stock in any corporation or joint-stock association.

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, money unpaid on contracts for the sale of lands, and every other species of personal property not hereinafter excepted. Things annexed to the freehold, or to

building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of this section. The right of an heir to any property, not enumerated in this section, which by the common law would descend to him, is not impaired by the general terms of this section.

§ 2672, Code Civ. Pro.

Former § 2712.

Leasehold property. Subd. 1.

If the deceased has leasehold property the executor or administrator may sell the lease or enter into possession and receive the rent. In the latter case the rent so received is not general assets until the rent due under the lease held by deceased has been paid, but should be paid over to satisfy the terms of the original lease. *Miller v. Knox*, 48 N. Y. 232.

Where a deceased has entered upon a yearly tenancy of real estate and his representative does not end the tenancy, the representative is liable for the rent until the end of the term and the estate or interest passes to the representative. *Pugsley v. Aikin*, 11 N. Y. 494.

Rent charge.

A rent charge with condition of re-entry is held to be real estate. *Van Rensselaer v. Hays*, 19 N. Y. 68; *Cruger v. McLaurry*, 41 id. 319; *Fowler's Real Property Law*, on Perpetual Rents (2 ed.), 172 et seq., 180, n. 28. *Van Rensselaer v. Read*, 26 N. Y. 558.

Church pew.

The interest of the lessee of a pew in perpetuity is an interest in real estate, and is subject to all the incidents thereof. It is, however, a mere right of occupancy, and gives no right to the soil or to the body of the church. The interest of the pew holder is a qualified interest. It is limited to the use thereof during divine worship. It is limited, also, as respects time. If the house is burnt, or destroyed by time, the right is, in general, gone. The building and soil are vested in the religious corporation usually

through trustees. In case of a destruction of a pew for convenience only, or in a wanton abuse of power by the trustees, pew holder will have a right of action for damages. *Voorhee, The Presbyterian Church*, 8 Barb. 135; aff'd, 17 id. 103; *Paul's Church v. Ford*, 34 id. 16.

As to rights of pew holders, vide *Cooper v. First Presbyterian Church*, 32 Barb. 222; also *Woodworth v. Payne*, 74 N. Y. 19 aff'g, 5 Hun, 551.

Growing crops. Subd. 5.

Growing crops shall go to the executor or administrator to be applied and distributed as part of the personal estate of their testator or intestate and shall be included in the inventory therefor. Under this provision the executor takes possession of the growing crops as he does of all other personal property. But he takes possession only for the purposes of administration according to law. He may sell them if necessary for the payment of debts and legacies. But when the land upon which the crop is growing has been devised in such a form as to convey it to the devisee, then the crop is to be put upon the footing of a chattel specifically bequeathed and it cannot be sold for the payment of general legacies, and can be sold for the payment of debts only after the other assets not specifically bequeathed have been applied. *Stall v. Wilbur*, N. Y. 158.

Grass and fruit growing upon lands belonging to an intestate at the time of his decease are not assets belonging to the administrator, but descend with the land to the heir. *Kain v. Fisher*, N. Y. 597.

Crops growing on land devised go to the executor if needed to pay debts, etc., but if not so needed go to the devisee of the land. *Bradner v. Faulkner*, 34 N. Y. 347.

Crop on dower land is personal property.

A widow may bequeath a crop in the ground of land held by her dower.

Rents. Subd. 7. See ¶ 313.

Rents which had not become due and payable at the time of the death of the owner belong to the heirs, and are not assets to be paid to the representative and distributed by him. *Matter of Strickland*, 10 Misc. Rep. 486, 65 N. Y. St. Repr. 250, 32 N. Y. Supp. 171.

Rents accrued but not due at the date of death may be apportioned between the heir, or devisee, and the representative, the latter being entitled to receive the proportionate part from the time the rent last became due to the date of death.

See section 2674 (¶ 313) providing for such apportionment.

Rent accrued where deceased and another held property in common goes to the representative. *Matter of Foulds*, 35 Misc. Rep. 171, 71 N. Y. Supp. 473.

Rent which accrued before owner's death goes to the representative, and there cannot be set off against it a claim for damages accruing after such death. *Jay v. Kirkpatrick*, 26 Misc. Rep. 550, 57 N. Y. Supp. 476.

Farm let "on shares"; proceeds.

Where a farm is let "on shares" the proceeds from milk which the deceased would have been entitled to had he lived belong to the representative and are distributable as personal estate. An agreement to work on shares is not a lease. *Matter of Strickland*, 10 Misc. Rep. 486, 32 N. Y. Supp. 171, 65 St. Repr. 250; *Matter of Ellis*, 78 Misc. Rep. 589, 139 N. Y. Supp. 1011.

Testator died in June and widow was devisee of farm for life. Farm was rented on shares, and tenant paid to widow a share of the proceeds of sale of hay — *held*, that the widow took proceeds as life tenant and not as executrix. *Matter of Chamberlain*, 140 N. Y. 390; mod'g, 46 N. Y. St. Repr. 841.

Damages to real estate.

A right of action for an injury to the rental value of real estate done while testator is alive passes to his executor or administrator and not to the devisee or heir of the real estate and is a part of the

personal assets of the deceased. *Griswold v. Met. E. R. Co.*, 12: N. Y. 102; *Robinson v. Wheeler*, 25 id. 252; *Shepard v. Manh. R. Co.*, 117 id. 442.

Assets pledged. See ¶ 136.

If the representative finds assets pledged as security for obligations of the deceased, he should carefully investigate the conditions and so act that the assets will be preserved. If there is an equity in such securities he may use the funds of the estate to protect them or he may advance his own funds and in either case he will be protected in the exercise of good judgment.

Such assets should be mentioned with a statement setting forth the facts as to the pledge and whether or not in the judgment of the appraisers there is any equity which can be realized.

Redeeming pledges.

It is elementary law that for any money advanced by an executor or administrator of an estate he is entitled to reimbursement out of the estate. "But if the executor redeem with his own money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets. In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right. * * * But in equity the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor." (3 Williams on Executors [7th ed. — 6th Am.], bottom paging 1661. See, also Perry on Trusts, § 485.) *Matter of Gill*, 199 N. Y. 155.

¶ 196 Property and Rights Held Not to Constitute Assets
Proceeds of fire insurance.

Insurance money received by the administrator as proceeds of a policy of fire insurance on real estate owned by the deceased

which burned shortly after his death and before the policy was changed belongs to the administrator in trust for the heirs, and is not assets in the hands of the administrator. *Wyman v. Wyman*, 26 N. Y. 253; *Herkimer v. Rice*, 27 id. 163; *Matthews v. American Cent. Ins. Co.*, 9 App. Div. 339, 75 N. Y. St. Repr. 716, 41 N. Y. Supp. 304; modified in and aff'd, 154 N. Y. 449; *Lawrence v. Niagara Fire Ins. Co.*, 2 App. Div. 267, 73 N. Y. St. Repr. 397, 37 N. Y. Supp. 811; aff'd, 154 N. Y. 752.

Proceeds of fire insurance policies standing in the name of a deceased owner of the real estate go to his executors or administrators as trustees for the true owners and not as assets of the estate of the deceased. *Matter of Kane*, 38 Misc. Rep. 276, 77 N. Y. Supp. 874.

Real estate devised for life.

Real estate devised to the widow until her death or remarriage is not assets of the estate even where there is a power of sale given, as that cannot be exercised until the event occurs. *James v. Beesly*, 4 Redf. 236.

Money paid over in lifetime.

Money paid by testator to another person under an agreement as to its use during life and its disposition after death, cannot be recovered by the executor of testator as part of his estate. *Morris v. Wucher*, 115 App. Div. 278.

New York Produce Exchange gratuity.

A gratuity fund from the New York Produce Exchange payable on the death of a member according to its by-laws is not assets liable to pay debts or legacies. *In re Fay's Estate*, 25 Misc. Rep. 468, 55 N. Y. Supp. 749.

Insurance for benefit of widow. See ¶ 198.

Where an insurance policy on the life of the husband is made payable to the assured, his executors, administrators, or assigns for the benefit of his widow, the proceeds are not assets of the estate subject to the payment of debts and legacies, but come to the

representative as trustee for the widow. *Van Dermoor v. Van Dermoor*, 80 Hun, 107, 61 N. Y. St. Repr. 770, 42 Hun, 326, 3 N. Y. St. Repr. 713.

Pension money. See ¶ 245.

Widow who obtained pension died leaving unexpended pension money and infant children — *held*, that such money was not liable for such widow's debts. *Hodge v. Leaning*, 2 Dem. 553.

Pension money deposited in bank is assets subject to payment of debts. *Beecher v. Barber*, 6 Dem. 129, 20 N. Y. St. Repr. 136.

Pension money received by a mother for services of her son remaining in bank at her death are liable for her debts. *Matter of Winans*, 5 Dem. 138.

Pension accrued at the death of the pensioner, or which has been allowed to the applicant but not paid at the time of death, does not become assets but goes to the widow or minor children. See U. S. Statutes, 28 Stat. 964, Chap. 193, Act of 1895. See ¶ 459.

Proceeds of sale of land of infant or lunatic by process of law. See ¶¶ 197, 350.

Money derived from payment by the elevated railroad pursuant to a judgment, to the committee of a lunatic, is upon the death of the lunatic real estate passing to his heirs and not personal estate passing to the next of kin. *Ford v. Livingston*, 140 N. Y. 162; aff'g, 70 Hun, 178, 54 N. Y. St. Repr. 164.

Where a person whose land is sold during his infancy, is an incurable incompetent from birth, the nature of the property remains unchanged after he arrives at age and during his life. *Matter of McMillan*, 126 App. Div. 159, 110 N. Y. Supp. 622; aff'd, 193 N. Y. 651.

Proceeds of sale of infant's real estate remain such and cannot be converted into personalty by any act of the infant or guardian. *Matter of McKay*, 37 Misc. Rep. 590, 75 N. Y. Supp. 1069; mod'd, in 75 App. Div. 78, 77 N. Y. Supp. 845.

An administrator cannot have distribution of proceeds of sale of

infant's real estate on an accounting. The Surrogate Court has jurisdiction to distribute personal estate only. *Matter of Woodworth*, 5 Dem. 156, 3 N. Y. St. Repr. 225.

¶ 197 Certain Property May Not be Assets in the First Instance, but May Become Such, or May be Declared to be Such. (See ¶ 196.)

Proceeds of sale of real property of a lunatic or infant; when real estate and for what purposes treated as personal property. See ¶ 350.

Proceeds of sale of real property of an infant or lunatic remain real estate until they become competent. But if either dies before becoming competent, not leaving any personal property, or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then such fund is to be deemed personal property so far as may be necessary to meet such demands.

Such proceeds are payable to an administrator for such purpose, and the residue must be returned by such administrator to the trustee or persons who had the legal control of the fund.

A sale of real property, or of an interest in real property other than a possibility of reverter of an infant or incompetent person, made as prescribed in this title, does not give to the infant or incompetent person any other or greater interest in the proceeds of the sale, than he or she had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed. The proceeds of the release of a possibility of reverter shall be deemed and treated as if they were proceeds of real property of which the infant was seized and possessed. If the infant should die before arriving at full age, or the incompetent person should die before the incompetency is removed not leaving any personal property, or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then in either or each case the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid upon order of the surrogate's court or court having jurisdiction of the estate of deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, shall upon the order of the surrogate, be paid into the hands of the trustee who held the same, to be distributed as the law directs. This act is to include the said proceeds of

any infant or incompetent person that has died prior to this amendment, the proceeds now remaining in the hands of a trustee.

§ 2359, Code Civ. Pro

Where an infant dies after the sale of his real estate and deposit of the proceeds thereof with the county treasurer, and there has been no adjudication by the surrogate of the validity of certain alleged debts in any proceeding in which the infant's heirs were cited or represented, his administratrix's application for a peremptory writ of mandamus directing the county treasurer to pay over such proceeds, with interest, less fees, pursuant to an order made by the surrogate under Code Civ. Pro., § 2359, will be denied *People ex rel. Jenny v. Brown*, 146 N. Y. Supp. 123.

The provision for payment over to the representative of deceased infant or incompetent applies only to cases where the real estate has been sold to pay debts, etc., and not where it has been sold in partition. *Flynn v. Lynch*, 27 N. Y. Supp. 926, 23 Civ. Proc. 369; *Matter of Reeve*, 38 Misc. Rep. 409, 77 N. Y. Supp. 936.

Bank deposits in trust for another.

Since a deposit in trust for another may be revoked during life and remains at all times subject to the control of the depositor, in the absence of sufficient assets to pay debts, such deposit becomes a part of the estate of the depositor for such purpose. *Beake Dairy Co. v. Berns*, 128 App. Div. 137, 112 N. Y. Supp. 529. See ¶ 194.

Assets; debt due from executor to testator; effect of discharge by will.

The naming of a person executor in a will does not operate as a discharge or bequest of any just claim due or to become due which the testator has against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due and he must apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal property of the deceased. The discharge or bequest in a will of a debt or demand of the testator against an executor named therein, or against any other person, not valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must

be included in the inventory and, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, must be paid in the same manner and proportion as other specific legacies.

§ 2673, Code Civ. Pro.

Effect of revision. From former § 2714.

There has been added in about the second line, "due or to become due," so that a condition might not again arise where the executor owed a debt to the deceased, paid a legacy to himself, and went into bankruptcy. *Matter of Burdick*, 79 Misc. Rep. 167, 140 N. Y. Supp. 582.

Debt due from the executor or administrator to deceased. See ¶¶ 341, 392.

A debt due from the executor or administrator to the deceased is made by section 2673, Code Civ. Pro., assets in his hands, but in case of his insolvency or actual inability to pay it, he may have credit therefor.

This section applies to a debt due from the firm of which the executor is a member, and such a debt should be charged to the executor. *Matter of Consalus*, 95 N. Y. 340.

Where the property came to the executor before death of testator, upon issue of letters, such fund becomes at once assets in the hands of the representative. See section 2582, Code Civ. Pro. *Matter of Brintnall*, 40 Misc. Rep. 67, 81 N. Y. Supp. 250.

Subjecting the executor, as between himself and those interested in the estate, to liability for his debt as for so much money in his hands does not necessarily discharge a lien on real estate by which the debt may be secured. *Soverhill v. Suydam*, 59 N. Y. 140.

An executor who was insolvent and indebted to the estate, having sustained a loss by fire, indorsed on his policy of insurance an assignment of it to himself as executor, and upon receiving payment, deposited the money in a bank to his credit as executor — *held*, an appropriation of the money to pay the debt he owed the estate. *Scrantom v. Farmers' & Mech. Bank*, 24 N. Y. 424.

¶ 198 Proceeds of Insurance Policies as Assets.**Life insurance.**

The distinction between two classes of policies — those payable to the insured or his personal representatives, and those payable to a specific beneficiary — is clearly recognized by the decisions.

In the first class the contract is made for the benefit of the insured and the proceeds pass to his personal representatives as a part of his estate and are liable for the payment of his debts and legacies; while in the latter case the contract is made for the benefit of others, and the proceeds are transferred to them by the terms of the contract, and not by virtue of the Statute of Distributions or the provisions of the will of the insured. *Matter of Fay*, 25 Misc. Rep. 468, 55 N. Y. Supp. 749.

Payable to the deceased, his executor, administrator or legal representative

Where a policy is payable to the deceased or to his executors, administrators, or his personal representatives, the proceeds form a part of his estate and are liable for debts and legacies. *Matter of Knoedler*, 68 Hun, 150, 52 N. Y. St. Repr. 47; aff'd, 140 N. Y. 377.

A paid-up policy payable "to his legal representatives" was held not to be payable to his administrators under the facts of that particular case, the evident intention of the insured being given effect. *Griswold v. Sawyer*, 125 N. Y. 411; rev'g, 56 Hun, 12.

Policy payable to another, but premium paid by the insured; proceeds when assets.

Insurance of husband's life.— A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term, she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The

policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendant surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured.

§ 52, Domestic Rel. Law.

Assessment insurance.

Assessment insurance is not included in the terms of this statute. *Dominick v. Stern*, 79 Misc. Rep. 271, 139 N. Y. Supp. 59.

Other assets must be first applied.

Right of creditor to have applied to debts insurance purchased by payment of premiums above \$500 a year does not accrue until other assets have been applied to the payment of debts. *Kittel v. Domeyer*, 175 N. Y. 205; rev'g, 70 App. Div. 134, 75 N. Y. Supp. 150; *Guardian T. Co. v. Straus*, 139 App. Div. 884; aff'd, 201 N. Y. 546.

The insurance moneys are not general assets of the estate. No part can be disposed of under the Statute of Distributions or used for the expenses of administration. They constitute a special fund created by statute for a special purpose and can be applied on the claims of creditors only after a decree of a court of equity.

Action to enforce lien.

The orderly course of procedure, as adopted in *Hirshfeld v. Fitzgerald*, is by a representative action to establish and enforce the lien after the assets of the estate have been exhausted and the amount required to pay the remainder of the husband's debts has been established by a decree of the surrogate. Distribution may doubtless be made in the action brought for that purpose

and circuitry thus avoided. No part of the fund is applicable the purposes of general administration, as it is liable for debt only, and is held as a separate fund, devoted exclusively to the payment of the deficiency arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. *Kittel v. Domeyer (supra)*; *Matter of Thompson*, 184 N. Y. 36; rev'g, 102 App. Div. 617.

Is not part of the estate of insured.

Where an insurance upon the husband's life is payable to the wife, this Act does not make any part of such insurance the property of the husband or of his estate after his death.

The proceeds of such a policy are not to be included in the inventory of his property. The statute does not make such proceeds a part of his estate nor provide that it shall be his property even as to creditors, but directs that the fund itself shall be primarily that is, in order of payment, liable for his debts. The liability owing wholly to the act of the Legislature, and the husband has not any legal or equitable interest in the policy if he dies insolvent or the statute imposes a lien upon the proceeds thereof for the benefit of his creditors. Should the wife die before the husband the proceeds should go to her personal representatives, though the excess would still be subject to the claims of the creditors. *Matter of Thompson*, 184 N. Y. 36; rev'g, 102 App. Div. 617.

A policy taken out by the husband and made payable to his wife "if living in conformity with the statute, and if not living their children," does not pass under the will of the wife who dies before her husband. *Bradshaw v. Mut. Life Ins. Co.*, 187 N. Y. 347; rev'g, 109 App. Div. 375.

A case under the same title was subsequently decided in a contrary manner, it apparently being held that the application for insurance was made by the wife. *Bradshaw v. Mut. Life Ins. Co.* 205 N. Y. 467.

Married woman may not will or assign policy in certain cases.

The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving

no descendant surviving. After the will or assignment takes effect, the legatee or assignee takes such policy absolutely.

From § 52, Domestic Rel. Law.

In *Pool v. New Eng. Mut. L. I. Co.*, 123 App. Div. 885, 108 N. Y. Supp. 431, it was held that where the wife insured the life of the husband for her own benefit, and died prior to his death, her representative and not his was entitled to payment.

The question afterward arose (*Matter of Pool*, 66 Misc. Rep. 122, 122 N. Y. Supp. 1118) whether the proceeds passed under her will, she having died leaving descendants, and it was held that they did not so pass, but as to the same she died intestate.

Jurisdiction under former practice.

Where the policy is made payable to the wife, the surrogate has no jurisdiction to try as between husband and wife and the creditors of her husband the question as to whether any part of the proceeds of the policy was charged with the statute lien in favor of his creditors. *Matter of Thompson*, 184 N. Y. 36; rev'g, 102 App. Div. 617.

The fact that the wife is the representative of her husband's estate does not give the surrogate jurisdiction to try the question as between the wife and the husband's creditor as to whether or not they have lien upon the surplus of the insurance. *Matter of Thompson*, 184 N. Y. 36; rev'g, 102 App. Div. 617.

Jurisdiction under the present practice.

Where the accounting party makes a claim to the ownership of a fund on which a creditor, being a party to the proceeding, claims to have a lien for the satisfaction of his debt, the surrogate under the present practice may determine on judicial settlement whether that fund is assets in the hands of the accounting party which should be charged to him and distributed to creditors in payment of their debts.

Effect of death of beneficiary.

Where the policy is payable to the beneficiary, her executors, administrators and assigns, her death before that of the insured

does not change the contract, and the proceeds go to her estate. *Pool v. N. E. M. L. Ins. Co.*, 123 App. Div. 885, 108 N. Y. Supp. 431.

A policy on the husband's life issued to the wife on her application, becomes, upon her death an asset of her estate, although she never held the policy or paid the premiums. *Bradshaw Mut. L. Ins. Co.*, 127 App. Div. 817, 112 N. Y. Supp. 107.

Accident insurance; benefit insurance.

The proceeds of a policy of accident insurance made payable to the estate are subject to disposition by will. *Matter of Smit*, 46 Misc. Rep. 210, 94 N. Y. Supp. 90.

Payments by benefit association.

Whether or not sums paid to the widow or family from fraternal organizations are assets depends upon the constitutions and by-laws of those associations.

Benefits received from the Sons of Temperance, I. O. O. F. Fidelity Temple of Honor and Temperance are not assets. *Matter of Brooks*, 5 Dem. 326, 5 N. Y. St. Repr. 381.

¶ 199 Partnership Property Does Not Pass to the Representative of the Deceased Partner, but to the Surviving Partner Who Has the Exclusive Right to Dispose of It in the Performance of His Duty to Pay the Firm Debts.

The inventory made by the representative of a deceased partner should not include an inventory of the firm assets, but of the estimated balance due the deceased partner upon the winding up of the firm business.

No specific enumeration of the articles of partnership property at the death of one partner should be made by his representative in the inventory of his estate, but the interest of the deceased partner may be set out as an unascertained balance in the partnership assets. *Thomson v. Thomson*, 1 Bradf. 24; followed in 9 Civ. Pr. 231.

On the death of a member of a firm the legal title to the assets of the firm vests in the surviving members, and what is left to the representatives of a deceased partner is the right to an accounting. *Matter of King*, 71 App. Div. 581, 76 N. Y. Supp. 220; aff'd, 172 N. Y. 616.

The surviving partner has the exclusive right to dispose of the firm assets in the performance of his duty to pay the firm debts. The representative of the deceased partner has no legal interest in such estate and no legal right to interfere so long as the survivor is applying the proceeds in the payment of firm debts. *Williams v. Whedon*, 109 N. Y. 333; *Loeschigk v. Hatfield*, 51 id. 660; aff'g, 5 Robt. 26; *Preston v. Fitch*, 137 N. Y. 41; rev'g, 46 N. Y. St. Repr. 588, 19 N. Y. Supp. 849.

A surviving partner has the legal title to the partnership assets for the purpose of disposing of the same and paying the partnership debts for the benefit of himself and the estate of his deceased partner. *Russell v. McCall*, 141 N. Y. 437; rev'g, 68 Hun, 44, 52 N. Y. St. Repr. 53, 22 N. Y. Supp. 615; *Nehrboss v. Bliss*, 88 N. Y. 600.

A surviving partner may renew a lease which contains a covenant for renewal, although one of the partners who was a party to the lease has died. *Betts v. June*, 51 N. Y. 274.

Where an executor and his testator were prior to the death of the latter copartners, it was the duty of the executor at once after the death of the testator to have separated the interest of the deceased from the partnership business, and not having done so it was proper to charge him with compound interest. *Hannahs v. Hannahs*, 68 N. Y. 610; distinguished in *Matter of Rowe*, 42 Misc. Rep. 175, 86 N. Y. Supp. 253.

A survivor closing up the business cannot bind the estate of a deceased partner by accommodation indorsements. *Nat. Bank of Newb. v. Bigler*, 83 N. Y. 51.

A sale of the interest of a deceased partner in the firm by his executor is not a liquidation, and is voidable. *Matter of Silkman*, 121 App. Div. 202, 105 N. Y. Supp. 872; aff'd, 190 N. Y. 560.

Upon death of sole surviving partner.

Upon the death of a sole surviving partner, the firm assets pass to his executor or administrator to be distributed in surrogate's court. The supreme court will not take jurisdiction and appoint a receiver unless it appears that the surrogate's court cannot afford all the relief necessary. *Dickinson v. Powers*, 140 App. Div. 105, 125 N. Y. Supp. 949.

Firm name and good will.

Right to firm name does not belong to the surviving partner, but should be sold for benefit of the firm assets. *Slater v. Slater*, 175 N. Y. 143; mod'g, 78 App. Div. 449.

The business name and good will of an insurance business depending upon the personal contracts of the deceased with several companies not considered as assets. *Matter of Case*, 122 App. Div. 343, 106 N. Y. Supp. 1086.

Partnership; value of good will.

Where the accounting party is both executor and surviving partner the surrogate *In re Greaney*, 47 N. Y. Law J. 1560, laid down the following rule as a basis for computing the value of "good will"; the aggregate profits of the last three years of decedent's lifetime, less annual interest upon the capital employed in the concern, and less such sums as may be found to have been the value of the personal services which the partners contributed to the business. See also *Matter of Welch*, 77 Misc. Rep. 427, 137 N. Y. Supp. 941.

The good will of a partnership is an asset, and its value may be ascertained on the basis of the annual profits of the business just before testator's death. *Matter of Silkman*, 121 App. Div. 202, 105 N. Y. Supp. 872; aff'd, 190 N. Y. 560; *Matter of Ball*, 146 N. Y. Supp. 499.

¶ 200 Duty of Surviving Partners to Deal Fairly; Accounting and Settlement.

The relation which a surviving partner holds to the representative of a deceased partner has been clearly defined and is generally

understood. It is a fiduciary relation, involving trust and confidence of the highest character, which absolutely prohibits the surviving partner acquiring any benefit from the deceased partner's interest at the expense of his representative. *King v. Leighton*, 100 N. Y. 392; *Case v. Abeel*, 1 Paige, 393; *Murray v. Mumford*, 6 Cow. 441; *Sigourney v. Munn*, 7 Conn. 11; *Jones v. Dexter*, 130 Mass. 380. It is a relation stronger and more exacting than that which exists between partners themselves, inasmuch as the law commits to them, to the exclusion of others, the care and management of the deceased partner's interest for the payment of debts and distribution. He is not a mere agent, but a trustee, and by reason of such relationship the same remedy exists on behalf of the representative of the deceased partner against the surviving partner as exists against a trustee strictly so called in behalf of a *cestui que trust*. *Holmes v. Gilman*, 138 N. Y. 369; *Bauchle v. Smylie*, 104 App. Div. 513, 93 N. Y. Supp. 709.

Accounting by surviving partner or his assignee.

The representative of a deceased partner may adjust and settle by agreement with the surviving partner all the partnership affairs, and such settlement in the absence of fraud will be binding upon all parties and the creditors of the deceased partner. *Sage v. Woodin*, 66 N. Y. 578.

There has been some confusion in the cases as to where the accounting by the surviving partner should be had, if a dispute over it arose.

Where the surviving partner is an administrator or executor.

In *Joseph v. Herzig*, 198 N. Y. 456; mod'g, 135 App. Div. 141, the surviving partner was one of the executors of the will of the deceased partner, and in an action in Supreme Court by the other executor for an accounting, he set up as a defense his accounting in Surrogate's Court. It was held that the decree was a defense.

In *Matter of Mertens*, 39 Misc. Rep. 512, 80 N. Y. Supp. 376, it was said that if there were two members of the firm the decedent

and the executor of his will, the Surrogate's Court would have had jurisdiction to take the account.

Where the executor or administrator is sole surviving partner of the deceased, the settlement of the partnership accounts must be had on his judicial settlement in Surrogate's Court. *Matter of Dummett*, 38 Misc. Rep. 477, 77 N. Y. Supp. 1118; distinguished in *Matter of Mertens*, 39 Misc. Rep. 512, 80 N. Y. Supp. 376.

Where there are two surviving partners, and one of them is not a party to the accounting, the surrogate has no jurisdiction to investigate the partnership business. *Matter of Mertens*, 39 Misc. Rep. 512, 80 N. Y. Supp. 376.

The management of copartnership affairs consisting of three partners by a surviving partner is not the subject of an accounting in a Surrogate's Court, but an accounting thereof must be had in a court of competent jurisdiction, and the surplus, if any, of partnership property will be the amount of assets in the hands of the representative. *Thomson v. Thomson*, 1 Bradf. 35; *Matter of Irvin*, 87 App. Div. 466, 84 N. Y. Supp. 707.

Accounting by purchaser from surviving partner.

One who purchases the interest of a surviving partner in a firm while he obtains the legal title to and possession of the firm assets takes with them the obligation of his vendor to wind up the business, and realize upon the assets for his own benefit and that of the estate of the deceased partner, because he takes the property impressed with the trust growing out of the duty of the surviving partner to realize upon them for such purpose. *Hutchinson v. Campbell*, 13 Misc. Rep. 152, 65 N. Y. St. Repr. 74, 34 N. Y. Supp. 82.

Partnership agreement as to disposition of assets may be enforced.

Partners may agree that the survivor may purchase the firm property upon certain terms and conditions, and the representatives of the deceased partner have authority to accept the terms of such agreement. *Hull v. Cartledge*, 18 App. Div. 454, 41 N. Y. Supp. 450.

Surviving partner not entitled to compensation.

It has long been the established rule that a surviving partner should not be allowed any compensation for his services in liquidating the business. *King v. Leighton*, 100 N. Y. 386; *Slater v. Slater*, 78 App. Div. 449, 459, 80 N. Y. Supp. 363; *Burgess v. Badger*, 82 Hun, 488, 31 N. Y. Supp. 614; *Skidmore v. Collier*, 8 Hun, 50; *Coursen v. Hamlin*, 2 Duer, 513. It is the duty of an administrator, and, in the absence of a direction for the continuance of the business of the decedent in his will, of an executor, to dispose of the business and convert it into cash with all reasonable dispatch, having due regard for the interests of the next of kin or beneficiaries and creditors (*Riddle v. Whitehill*, 135 U. S. 621; *Gilmore v. Ham*, 142 N. Y. 1, 8); and a continuance of the business beyond a reasonable time for this purpose is unauthorized. An administrator or executor is ordinarily confined to the fees or commissions prescribed by statute; and if the business of the decedent be continued under authority contained in the will, the services rendered by the executor in continuing it are deemed part of the duties of his office and he cannot receive therefor any compensation other than the commissions allowed by law. *Matter of Hayden*, 54 Hun, 197, 7 N. Y. Supp. 313; aff'd, 125 N. Y. 776, on opinion at General Term. In *Matter of Hayden* (*supra*), it was held that a son employed by his father at a salary of \$5,000 per annum, appointed executor of his father's will and authorized thereby to continue the business in his discretion, electing to continue it under an arrangement with his coexecutors that he should receive the same salary as during the lifetime of his father, was not entitled to an allowance for the salary on an accounting, it appearing that there were infants in interest for whom lawful consent thereto had not been given. If, however, the appellant had continued the business at the request of all parties in interest and they were competent to consent, then doubtless he would have been entitled to receive the salary which he appears to have justly earned. *Matter of Braunsdorf*, 13 Misc. Rep. 666, 2 App. Div. 73; *Lent v. Howard*, 89 N. Y. 169.

See also *Burgess v. Badger*, 82 Hun, 488, 31 N. Y. Supp. 614 and *Robinson v. Simmons*, 146 Mass. 167. It follows, therefore that the appellant's account was properly surcharged with the amount of the salary withdrawn by him. *Clausen v. Puvoget* 114 App. Div. 455, 100 N. Y. Supp. 49.

The duty of winding up the partnership affairs by the surviving partner without compensation is one of the incidents of a partnership and no allowance can be made an executor or administrator for such service. *Matter of Dummett*, 38 Misc. Rep. 477 77 N. Y. Supp. 1118; *Johnson v. Hartshorne*, 52 N. Y. 173; *Burgess v. Badger*, 82 Hun, 488, 31 N. Y. Supp. 614; *Matter of Harris*, 4 Dem. 463, 1 N. Y. St. Repr. 331.

Compensation has been allowed when the representative has performed duties not obligatory at the request of the parties *Lent v. Howard*, 89 N. Y. 169; *Matter of McCord*, 2 App. Div. 326, 37 N. Y. Supp. 852; *Matter of Moriarity*, 27 Misc. Rep. 161, 58 N. Y. Supp. 380; *Matter of Braunsdorf*, 13 Misc. Rep. 672, 69 N. Y. St. Rep. 652, 35 N. Y. Supp. 298; modified and aff'd, 2 App. Div. 73, 72 N. Y. St. Repr. 764, 37 N. Y. Supp. 229.

¶ 201 Directions to Continue Partnership Business.

By the general rule the death of a trader puts an end to any trade in which he was engaged at the time of his death, and an executor or administrator has no authority *virtute officii* to continue it, except for the temporary purpose of converting the assets employed in the trade into money. *Barker v. Parker*, 1 Tern Rep. 287. But a testator may authorize or direct his executor to continue a trade or to employ his assets in trade or business, and such authority or direction, if strictly pursued, will protect the executor from responsibility to those claiming under the will, in case of loss happening without his fault or negligence, and also entitle him to indemnity out of the estate for any liability lawfully incurred within the scope of the power. *Burwell v. Cawood*

2 How. (U. S.) 560; *Laible v. Ferry*, 32 N. J. Eq. 791; *Scott v. Izon*, 34 Beav. 434; *Lucas v. Williams*, 39 Giff. 150. The courts, while they have sustained with substantial unanimity the validity of a direction of a testator in his will that his trade should be continued, whether his business was that of a sole trader or of a firm of which he was a member, have applied stringent rules of construction in ascertaining both the existence and extent of the authority of the executor. In the first place, the intention of a testator to confer upon an executor power to continue a trade must be found in the direct, explicit, and unequivocal language of the will or else it will not be deemed to have been conferred (*Burwell v. Cawood*, *supra*; *Kirkman v. Booth*, 1 Beav. 273), and in the next place, a power, *simpliciter*, to carry on the testator's trade, or to continue his business in a firm of which he was a partner, without anything more, will be construed as an authority simply to carry on the trade or business with the fund already invested in it at the time of the testator's death, and to subject that fund only to the hazards of the trade and not the general assets of the estate (*Ex parte Garland*, 10 Ves. 119; *Cutbush v. Cutbush*, 1 Beav. 184; *Ex parte Richardson*, 1 Buck. 202; *McNeillie v. Acton*, 4 De G., M. & G. 742). The property already embarked in the business is the trade fund, unless it appears from the will that the executor was authorized to use the general assets in the business. In every case where a trade is carried on by an executor under authority of the will question may arise as to the respective rights of existing and subsequent creditors, that is, creditors of the testator and creditors of the trade whose debts were contracted in the business carried on by the executor. The creditors of the testator, under our statute and the general rule of law for the administration of assets of a decedent, are entitled to have the assets collected in and applied upon their debts, a reasonable time being allowed for the ascertainment of the debts and the conversion of the assets. It would seem that a direction of the testator that his business should be continued would not be allowed to interfere with this right of existing creditors, or

put to hazard the property of the testator applicable to the payment of their debts. *Stanwood v. Owen*, 14 Gray, 195.

It is the settled doctrine of the courts of common law that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually, and does not bind the estate which he represents, notwithstanding it may have been contracted for the benefit of the estate. *Austin v. Monro*, 47 N. Y. 360. It has been held in numerous cases that an executor, carrying on a trade under the authority of the will, binds himself individually by his contracts in the trade. He is not bound to carry on the trade and incur this hazard, although authorized or directed to do so; but if he carries it on the contracts of the business are his individual contracts. *Ex parte Garland* (*supra*); *Fairland v. Percy*, L. R., 3 P. & D. 217; *Labouchere v. Tupper*, 11 Moore P. C. 198; *Downs v. Collins*, 6 Hare, 418. But, as said by Story, J., in *Burwell v. Cawood*, a testator may, if he chooses, bind his general assets for all the debts of a business to be carried on after his death. Where this was the intention of the testator expressed in the will, then, in case of the insolvency of the executor, we see no reason to doubt that, in equity, the general assets become liable for the debts of the business. In *Fairland v. Percy* (*supra*), Sir J. Hannan states the principle. He says: "Where a testator, by his will, directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who, after his death, become creditors of the business, in addition to the personal responsibility of the individuals who gave the order for the goods, or otherwise contracted the debt, are entitled in equity to claim against the estate to the extent that he authorized it to be used in that business." (See *Owen v. Delamere*, L. R., 15 Eq. 134.) *Willis v. Sharp*, 113 N. Y. 586; *aff'g*, 43 Hun, 434.

Notwithstanding a direction in the will that the executors carry on the business, the creditors have a right to have the assets applied to the payment of their debts. *Willis v. Sharp*, 113 N. Y. 586; *aff'g*, 43 Hun, 434.

A testator may authorize his executor to continue his business by using such general terms that his whole estate will become liable to pay such business debts. *Willis v. Sharp*, 113 N. Y. 586; aff'g, 43 Hun, 434.

Where the partnership agreement provided for the continuation of the business from the date of death of one partner until the first day of the next January, the income or earnings of the interest in such partnership is income, and not *corpus*. *Matter of Slocum*, 169 N. Y. 153; rev'g, 60 App. Div. 438, 69 N. Y. Supp. 1036.

A provision in a will for the continuance of the partnership business after the death of one partner is valid. *Walker v. Steers*, 38 N. Y. St. Repr. 654, 14 N. Y. Supp. 398.

When a business is carried on by executor under a power contained in a will only those assets of the estate which were already invested in the business at the time of the testator's decease will be subject to the hazards and risk of the business. *Matter of Hickey*, 34 Misc. Rep. 360, 69 N. Y. Supp. 844.

The executor is not authorized to involve the general assets of the estate; therefore, persons dealing with him are bound to know that they can resort only to the property embarked in the business. They could not even have recourse to the general assets of the estate, much less could they look to the beneficiaries individually, and the assent of the beneficiaries to what the will explicitly authorized could upon no possible theory make them personally liable. *Manhattan Oil Co. v. Gill*, 118 App. Div. 17, 103 N. Y. Supp. 364.

Note signed by executors adding "executors estate of," etc., where they are carrying on a business, binds them individually. *Darling v. Powell*, 20 Misc. Rep. 240, 45 N. Y. Supp. 794.

Liable for torts.

An executor carrying on business of the deceased is liable for damages arising from his negligence in the conduct of the business whereby a person receives personal injury. *McCue v. Finck*, 20 Misc. Rep. 506, 46 N. Y. Supp. 242.

Continuing partnership business without authority.

The rule is that in the absence of authority expressed in the will the death of a partner works the end of his trade, and, therefore, the executor has no authority to continue the business except for the purpose of converting the assets into money. *Willis v. Sharp*, 113 N. Y. 586; aff'g, 43 Hun, 434, and authorities cited; *Matter of McCollum*, 80 App. Div. 362, 80 N. Y. Supp. 755.

If in violation of this duty the administrator or executor continues the business or uses the money in his own business, his act is wrongful and the estate is not liable for any obligation incurred or loss sustained, and he may be charged interest upon the money thus wrongfully used, or, at the election of those interested, with the profits made in the business in which it is used; but in that event the burden is upon them to show the amount of the profits, and the business being unlawful and his own so far as the estate is concerned, he is not required to file an itemized account of the receipts and disbursements therein, or vouchers for such disbursements. *Estate of Munzor*, 4 Misc. Rep. 374, 25 N. Y. Supp. 818; *Matter of Peck*, 79 App. Div. 296; aff'd, 177 N. Y. 538; *Matter of Suess*, 37 Misc. Rep. 459, 461, 75 N. Y. Supp. 938; *Willis v. Sharp*, 113 N. Y. 591; *Kenyon v. Olney*, 39 N. Y. St. Repr. 839, 15 N. Y. Supp. 416; *Matter of U. S. M. & T. Co.*, 114 App. Div. 532, 100 N. Y. Supp. 12.

If the original creditors consent to the continuance of the business, they and the business creditors share *pro rata* in the property on dissolution. *Willis v. Sharp*, 113 N. Y. 586.

Where the income from conducting a business is to be paid a person there is chargeable to that income losses, depreciation, and wear and tear in conducting the business. *Matter of Jones*, 103 N. Y. 621.

Will construed as making profits of the continued partnership business principal and not income going to the life beneficiary. *Matter of Marx*, 49 Misc. Rep. 280, 99 N. Y. Supp. 334.

¶ 202 Partnership Debts are Payable First from Partnership Assets. See ¶ 394.

Partnership creditors cannot enforce a claim against the estate of a deceased partner unless the partnership and surviving partner are insolvent, until the remedy against the partnership assets and the surviving partner is exhausted.

The creditor must exhaust his remedy against a surviving partner; he may then proceed against the representative of the deceased partner.

Formerly the action had to be one in equity. *Richter v. Poppenhausen*, 42 N. Y. 373; *Voorhis v. Childs*, 17 id. 354; *Higgins v. Rockwell*, 2 Duer, 650; *Lane v. Doty*, 4 Barb. 530; *Tracy v. Suydam*, 30 id. 110; *Legatt v. Legatt*, 79 App. Div. 141, 80 N. Y. Supp. 327; aff'd, 176 N. Y. 500; *Hoyt v. Bonnett*, 50 N. Y. 538.

But in *Hentz v. Havemeyer*, 132 App. Div. 56; 116 N. Y. Supp. 317; it is stated that since the enactment of section 758, Code Civ. Pro., an action at law may be maintained.

How the remedy may be exhausted.

The Hentz case also holds that the remedy against the surviving partner is exhausted when the statute of limitations has run in favor of such partner.

When the partnership and surviving partner are wholly insolvent a creditor may then proceed against the estate of the deceased partner. *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Pope v. Cole*, 55 id. 124.

A member of the firm invested money of the firm in bonds and then sold the bonds and deposited the money in bank in his own name and died—*held*, that there having been no partnership accounting a surviving partner could not recover from the estate any part of such deposit. *Arnold v. Arnold*, 90 N. Y. 580.

Partnership debts presented to the estate of a deceased partner before the remedy against the surviving partner has been exhausted are contingent and not absolute debts. *Hoyt v. Bonnett*, 50 N. Y. 538.

Action for contribution.

A cause of action against the estate of a deceased partner for contribution does not accrue until the partnership business has been so far settled as to demonstrate the need of contribution. *Gray v. Green*, 125 N. Y. 203.

Individual and partnership debts.

Individual debts are entitled to be first paid from the separate estate and partnership debts from the partnership property. *Matter of Gray*, 111 N. Y. 404, aff'g, 42 Hun, 411.

CHAPTER XXXVIII.

What Property Constitutes Assets and Goes to the Representative, Continued.

- ¶ 203. Legacy for life and real property converted.
- ¶ 204. Contracts of the deceased.
- ¶ 205. Contracts for purchase of land.
- ¶ 206. Contracts for the sale of land.
- § 2345. Action to compel conveyance of land against an infant or incompetent.
- ¶ 207. Power of sale, when and how executed; its effect
- ¶ 208. § 2694. Who may execute power of sale.
- ¶ 209. Equitable conversion under power of sale.
- ¶ 210. Action to enforce power of sale.

¶ 203 Appraisal of Legacy for Life and of Real Estate Converted into Personalty.

Legacy of personal property for life may be construed as absolute and therefore become assets. See ¶¶ 279, 280, 444.

A legacy of the use of personal property for life may, in certain cases, from the language used in the will, be construed as an absolute gift, and when so construed such personal property will constitute assets. It may be necessary to obtain a construction of the will making such bequest to determine the question.

Appraisal and inventory of real estate which represents personalty or is converted into personalty.

While real estate is not generally the subject of inventory and appraisal, there are instances when it should be appraised and inventoried. It often is personal estate by reason of a mortgage foreclosure or other legal process, or must become personalty by virtue of a power contained in the will. In such cases it should be appraised and inventoried. See ¶ 209.

Real estate converted into personalty.

Real estate may be converted into personalty for payment of either debts or legacies, or both, and when a sale is had under a power of sale expressly given or necessarily implied, the proceeds will be applicable to the payment of expenses and debts. *Cahill v. Russell*, 140 N. Y. 402; *Matter of Bolton*, 146 id. 257.

Proceeds of sale of real estate converted under a power of sale, and the rent received before actual sale.

Rents received by executors where the real estate is devised to them with power of sale may be assets for payment of debts. *Glacius v. Fogel*, 88 N. Y. 434.

Land taken under foreclosure sale; proceeds of foreclosure of mortgage.

Where the interest of the decedent has been in the land and he has died before conversion by foreclosure sale, then his interest in the avails of the conversion goes to the heirs-at-law. Where the conversion has taken effect before the death of the decedent, then his interest in the avails goes to the administrator. *Denham v. Cornell*, 67 N. Y. 556.

Where a mortgage held by deceased has been foreclosed and the property bid in by the personal representatives, it becomes personal estate to be accounted for by the representative, and the heirs-at-law are not necessary parties to a deed conveying the same. *Haberman v. Baker*, 128 N. Y. 253; *Lockman v. Reilly*, 95 id. 64.

Real estate situated in another state converted under a power of sale, may be assets to be accounted for and applied in this state. *Matter of Newell*, 38 Misc. Rep. 563; 77 N. Y. Supp. 1116.

Land bid in on foreclosure may be sold. See ¶ 395.

The representative who bids in real estate on the foreclosure of a mortgage held by the deceased, may sell and convey the same as it belongs to the estate and remains personal property. *Bryan v. Carroll*, 122 App. Div. 301, 106 N. Y. Supp. 668.

When sold the proceeds must be apportioned according to the ratio which the aggregate principal put into the foreclosed prop-

erty bears to the income invested therein, calculating the interest to the date of sale by trustees. *Matter of Marshall*, 43 Misc. Rep. 238, 88 N. Y. Supp. 550.

Appraisal of New York Stock Exchange "seat."

A "seat" in the New York Stock Exchange is property, and an asset when owned by a person at the time of his death. *Matter of Grant*, 132 App. Div. 739, 116 N. Y. Supp. 1152.

¶ 204 Contracts of the Deceased May be Assets, or Debts.

The presumption is that the party making a contract intends to bind his executors and administrators, unless the contract is of that nature which calls for some personal quality of the testator, or the words of the contract are such that it is plain that no presumption of the kind can be indulged in. *Tremeere v. Morison*, 1 Bing. N. C. 89; *Reid v. Tenterden*, 4 Tyrw. 111; *Kernochan v. Murray*, 111 N. Y. 306.

The executor is not permitted to violate the contract of his testator after the latter's death. *Wentworth v. Cook*, 10 Ad. & El. 42; *Siboni v. Kirkman*, 1 M. & W. 419, remarks of Parke, B.

In *Quick v. Ludburrow* (3 Bulstr. 30), Lord Coke said that if a man be bound to build a house for another before such a time and he which is bound dies before the time, his executors are bound to perform this. To same effect, *Tilney v. Norris* (1 Ld. Raym. 553); *Tremeene v. Morison* and *Reid v. Tenterden* (*supra*).

If the testator devise his land to other parties, the executor still remains liable on the covenant of his testator. If the devisees do not permit the executor to build, the covenant is broken, and it is the act of the deviser in devising his property thus that prevents the executor from fulfilling.

If the land descended to the heir, then the covenant still remains in force; and if it should be that the executor could not force the heir to permit the building, still the estate is liable on the covenant, and the executor must pay the damages if he have assets. *Chamberlain v. Dunlop*, 126 N. Y. 45.

Liability of representative on covenant in a lease where lessor dies.

Covenants in leases are of two kinds:

Those which run with the land; those which are the personal covenants of the lessor.

Those which run with the land pass as a burden to grantees and reversioners and may be enforced against such grantees and the heirs or devisees of the lessor.

Where the contract or covenant is a personal one which does not concern the land itself, but has reference to personal property or personal services and is not one which runs with the land, the contract or covenant becomes an obligation of the lessor enforceable against his representatives upon his death.

Agreements not under seal relating to land do not run with the land.

A personal covenant concerning land, *e. g.*, an agreement to build a fence does not run with the land. *Guilfoos v. N. Y. C. & H. R. R. Co.*, 69 Hun, 593, 53 N. Y. St. Repr. 538, 23 N. Y. Supp. 925.

A note given for the purchase price of land may, upon the purchaser's death, be collected from his representative, although the land descends to the heirs. *Wright v. Holbrook*, 32 N. Y. 587.

A covenant to purchase personalty brought upon the demised premises, such as live stock, tools, seeds, etc., does not pass as a burden to the grantee or heir, but may be enforced as a debt of the estate of the deceased lessor.

Devolution of title.

By section 223 of the Real Property Law the rights of lessors and lessees and their successors in interest where there has been a devolution of title are prescribed and protected.

Rent due from deceased.

A landlord after the death of his tenant has three remedies for rent accruing after the death of the tenant: He may collect the same of the estate of deceased, or from the executor or administrator personally to the extent of the rents or profits received by

him, and the balance from the estate. *Miller v. Knox*, 48 N. Y. 232.

¶ 205 Contracts for Purchase of Land; Amount Unpaid is a Debt. See ¶ 412.

Where deceased died having a contract for purchase of land, the amount due upon such contract is payable from the personal estate and the provision that an heir or devisee shall satisfy all liens upon land out of his own property does not apply. *Wright v. Holbrook*, 32 N. Y. 587; *Chamberlain v. Dunlop*, 126 id. 45.

An executor may rightfully complete the testator's contract to purchase real estate, and if such land depreciates in value, he will not be charged with the loss. *Denton v. Sanford*, 103 N. Y. 607.

Executors may pay from the personal estate the balance due from testator upon a land contract, even though such payment goes entirely for the benefit of the heirs-at-law of such testator. *Matter of Davis*, 43 App. Div. 331, 60 N. Y. Supp. 315.

Land contracted to be purchased may be sold to pay debts of the purchaser.

See proceedings for sale of real estate, sections 2701-2718, and especially section 2715 (¶ 256) as to effect of conveyance of interest under contract.

Contract made by deceased for the purchase of real estate.

Where a person who has contracted to purchase real estate dies before the completion of the contract, the heirs or devisees may require the representative to pay the contract price from the personal estate so that they might demand and receive a conveyance. In a case where by the contract, the vendee had assumed mortgages upon the real estate, the heirs and devisees were held to be entitled to have the same paid from the personal estate. *Dickson v. Walker*, 47 N. Y. Law J. 1256; *Champion v. Brown*, 6 Johns. Ch. 398; *Chamberlain v. Dunlop*, 126 N. Y. 45; *Matter of Davis*, 43 App. Div. 331, 60 N. Y. Supp. 315.

Where a party has entered into a contract to purchase real estate and dies before it is conveyed to him and before he has

paid for it, his heir or devisee is entitled to have his executor pay for the realty out of the personal estate. *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Broome v. Monck*, 10 Ves. 596, 611; reargued, 10 Ves. 619; *Wright v. Holbrook*, 32 N. Y. 587.

Title where contract to purchase is completed by the representative.

As early as the Revised Statutes of 1830 it was provided that an administrator might take title to lands which his intestate had contracted to buy, and that having taken title in his own name he was declared as matter of law to hold it in trust for the benefit of the persons entitled to the interest of the deceased, which were his heirs, subject to the dower right of his widow, if any, therein. Prior to the Revised Statutes the law was, and now is, that where a person died holding a contract for the purchase of land his interest descended to his heirs as real estate, and such heirs had the right to call on the executor or administrator to discharge the contract out of the personal estate so as to enable the heirs to demand a conveyance from the vendor. (*Champion v. Brown*, 6 Johns. Ch. 398; *Chamberlain v. Dunlop*, 126 N. Y. 45; *Matter of Davis*, 43 App. Div. 331, 60 N. Y. Supp. 315.) An executor or administrator being bound to pay from the personal estate the balance due on a contract for the purchase of land made by his testator or intestate for the benefit of the heir, the law manifestly contemplates that he may take title on making such payment in his own name, and when he does so he does not and cannot hold title for himself, but holds it in trust for the heirs. *Matter of McMonagle*, 139 App. Div. 398, 124 N. Y. Supp. 258.

Dower of widow.

The widow of deceased vendee has dower in the real estate under contract. *Dickson v. Walker*, 47 N. Y. Law J. 1256; *Boyer v. East*, 161 N. Y. 580; *Hawley v. James*, 5 Paige, 318.

¶ 206 Rights and Liabilities of the Parties Where Contract of Sale has been Made.

In 1908 section 2801a of this chapter was added affording a proceeding to obtain title from the representative. Before that

time such title was obtained by an action for specific performance. The following decisions made both before and after the adoption of such section do not afford a guide as to the practice, but show some general principles.

Contracts of deceased to sell real estate.

Testator having made a contract to sell real estate and the time for performance having been extended by the executors of deceased — *held*, that such extension did not change the real estate so converted into personalty back into real estate. *Williams v. Haddock*, 145 N. Y. 144; *aff'd*, 78 Hun, 429, 60 N. Y. St. Repr. 422, 29 N. Y. Supp. 199.

Testator had contracted to sell land which was subject to a mortgage for which his estate was liable. Executors paid part of the principal of the mortgage for the purpose of protecting the land and carrying out the contract. The vendee failed to perform the contract — *held*, that the executors were not liable for the loss. *Matter of Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

The fact that a contract for sale has been made by the deceased owner does not give his executor an implied power of sale. *Murdock v. Kelly*, 62 App. Div. 562, 71 N. Y. Supp. 152.

Under a contract to convey the heirs can give a good title as against the creditors of the deceased owner. *Ritchie v. Bennett*, 35 App. Div. 68, 54 N. Y. Supp. 379.

Specific performance.

Where deceased made a contract to sell lands and died before the time fixed for delivery of the deed, the vendee being in possession, and especially where some of the heirs are infants, the proper practice is for the vendee to bring an action for specific performance. *Tompkins v. Hyatt*, 28 N. Y. 347.

Infant or incompetent interested.

Where the title of an infant or incompetent pursuant to a contract of sale, cannot be procured because of such infancy or incompetency, an action may be brought under sections 2345–2347, Code Civ. Pro. See this paragraph, *post*.

Trust estate.

Where a trust is created, the title to real estate contracted to be sold may vest in the trustees, and in such a case their deed in performance of the contract is good. *Hald v. Claffy*, 131 App. Div. 251, 115 N. Y. Supp. 561.

Rights and Duties of Representative Regarding Executory Contracts for the Sale or Purchase of Real Estate.

Conveyance of real property by executor or administrator to holder of contract of sale made by a decedent.

Where a decedent dies seized of lands after he has made a contract for the conveyance thereof, his executor or administrator may make a deed reciting said contract and conveying the said lands. The executor or administrator, or the vendee, his heirs or assigns, may file a petition praying for the confirmation of the act of the executor or administrator in delivering the deed, or for a decree that the same be made and delivered or the executor or administrator may pray for the like relief in a petition for the judicial settlement of his account. In either case, a citation shall issue to all persons interested, and the court shall make such decree as justice requires. A deed delivered pursuant to this section, upon its confirmation by such decree, shall be effectual to convey all the right, title and interest in the said lands which the decedent had at his death.

§ 2697, Code Civ. Pro.

Effect of revision. New section.

Former § 2801a upon the same subject repealed and the foregoing section substituted as furnishing a much more simple, short and inexpensive proceeding for completing the contract of the deceased.

Money received on contract to sell land is personal estate. See ¶ 412.

Where a contract to sell real estate has been made and the vendor dies, the balance paid on the performance of the contract by the vendee and the purchase money received by the representative is personal property and is distributable as such. *Williams v. Haddock*, 145 N. Y. 144; aff'g, 78 Hun, 429, 60 N. Y. St. Repr. 422, 29 N. Y. Supp. 199.

Tender of payment under land contract.

Where the vendor dies after having given a land contract or a lease with an option to purchase, tender of the purchase price

may be made to the representative as the land is thereby converted into personalty. *Rockland-Rockport Lime Co. v. Leary*, 133 App. Div. 379, 117 N. Y. Supp. 405.

Action to compel conveyance of real property against an infant or incompetent.

Consult Code Civ. Pro., §§ 2345–2347.

Action to compel conveyance.

In either of the following cases, an action may be maintained against an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, to procure a judgment, directing a conveyance of real property, or of an interest in real property:

1. Where the infant or incompetent person is seized or possessed of the real property, or interest in real property, by way of mortgage, or only in trust for another.

2. Where a valid contract for the sale or conveyance of the real property, or interest in real property, has been made; but a conveyance thereof cannot be made, by reason of the infancy or incompetency of the person in whom the title is vested.

§ 2345, Code Civ. Pro.

Who may maintain action.

An action may be maintained, in a case specified in the last section, by a person entitled to the conveyance; and also in a case specified in subdivision second of that section, by the executor or administrator of the person who made the contract, or of a person who died seized or possessed of the real property, or interest in real property, or by an heir or devisee of either of those persons, to whom the real property has descended, or was devised. The action may be maintained by the committee of the lunatic or other incompetent person; but in that case the court must appoint a special guardian for the incompetent person, as required by law, where an infant is defendant, and the proceedings are the same as in a like action against an infant.

§ 2346, Code Civ. Pro.

Where a deceased person executes a contract of sale and dies, a proceeding may be had before the surrogate to obtain a deed from the representative, as herein before stated, but these sections of the code provide a method of obtaining a conveyance in a class of cases of which the surrogate has no jurisdiction.

¶ 207 Power of Sale; When and How Executed, and its Effect.**Imperative and implied power of sale.**

Where a power or authority to sell is given without limitation, and is not in terms made discretionary and its exercise is made necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative, and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt, and his intention cannot otherwise be carried out. *Matter of Gantert*, 136 N. Y. 106; *Scholle v. Scholle*, 113 id. 261; aff'g, 56 N. Y. Super. Ct. 399, 4 N. Y. Supp. 809; which aff'd, 55 N. Y. Super. Ct. 474; *Chamberlain v. Taylor*, 105 N. Y. 185; *Hobson v. Hale*, 95 id. 588.

A power of sale will not be implied from the fact that real estate is devised to certain persons to be "divided" between them equally. *Murdock v. Kelly*, 62 App. Div. 562, 71 N. Y. Supp. 152; *Ingersoll v. Ingersoll*, 80 Misc. Rep. 299, 142 N. Y. Supp. 217.

The use of such words as "pay over," "sums," "fund," "all sales" and the like imply a power of sale and operate as a conversion. *Burnham v. White*, 117 App. Div. 515, 102 N. Y. Supp. 717.

No power of sale is expressly conferred upon the executors, but they are directed to invest the share being disposed of, and if compliance with this direction involves the sale of real estate the possession of such power will be implied. *Van Winkle v. Fowler*, 52 Hun, 355, 5 N. Y. Supp. 317, 24 N. Y. St. Repr. 811; *Dorland v. Dorland*, 2 Barb. 63; *Morton v. Morton*, 8 id. 18.

Where a discretionary power of sale is given in the will, and an imperative power given in a codicil, the latter will control. *Matter of Caldwell*, 188 N. Y. 115; mod'g, 114 App. Div. 906.

The general principle is clearly established by the authorities that the power of sale need not be express, but may be implied when it is evident from an examination of the entire will that otherwise the testamentary scheme would be defeated. *Salisbury*

v. *Slade*, 160 N. Y. 278; rev'g, 22 App. Div. 346, 48 N. Y. Supp. 55.

Foreclosure of mortgage; parties.

If by reason of the language or the general scheme of the will there is an implied or express imperative power of sale to carry out its provisions, there is an equitable conversion of the real estate into personalty, and the residuary legatees and devisees under the will are not necessary parties to a foreclosure suit. *Boehnicke v. McKeon*, 119 App. Div. 30, 103 N. Y. Supp. 930.

May convey land situated in another state.

Although an executor appointed in this State cannot act as such beyond our jurisdiction he may convey land situate in another State where the power to do so is contained in the will. *Newton v. Bronson*, 13 N. Y. 587.

May convey land in Wyoming, although power of sale void here, because of an after-born child. *Matter of Mackay*, 77 Misc. Rep. 303, 136 N. Y. Supp. 821.

Time limitation.

Where power is directed to be exercised within three years the time for its exercise is not limited. *Mott v. Ackerman*, 92 N. Y. 539.

A contract of sale made after the expiration of a date fixed for sale in the will is valid and a good title will be given. *Graham v. Ackerly*, 120 App. Div. 430, 105 N. Y. Supp. 51; *Deegan v. Wade*, 144 N. Y. 573.

Power of sale of undevise property.

A power of sale is void which applies to property which is undevise. The title and beneficial use can not be in one person, with a power of sale coupled with no interest in another. *Matter of Green*, 63 Misc. Rep. 638, 118 N. Y. Supp. 747; *Sweeney v. Warren*, 127 N. Y. 426; *Jennings v. Conboy*, 73 id. 230.

Devise failing because of after-born child.

Where a power of sale is given in a will which does not provide for an after-born child, such power can not act upon such intestate property. *Matter of Mackay*, 77 Misc. Rep. 303, 136 N. Y. Supp. 821.

Judgment against legatee.

On executing a power of sale to pay legacies, it is not proper for the executor to pay a judgment against a legatee, as such judgment is not a lien upon the land. *Matter of Van De Walker*, 79 Misc. Rep. 661, 141 N. Y. Supp. 325.

When a power of sale is limited and when general.

The question relating to the exercise of a power of sale in a will has so frequently been before the courts that it is unnecessary to refer specifically to the provisions of the Real Property Law concerning the subject, or to the numerous cases which have arisen under these provisions. The two views as to when a power of sale is limited and when general are discussed in *Sweeney v. Warren* (127 N. Y. 426) and *M'Cready v. Metropolitan Life Ins. Co.* (83 Hun, 526; aff'd, 148 N. Y. 761).

In the former, the provision of the will authorized the executors to sell "for the purpose of discharging all" debts, and when the executors sold the land, both they and the purchaser knew that the testator's personal property was more than sufficient to pay such debt. It was accordingly held, referring to the will, that "by this provision the lots mentioned are not converted into money out and out, but the executors are empowered to convert them for a specific purpose, to wit, the payment of the testator's debts. When a testator authorizes his executors to sell and convert into money all or a part of his realty for a specific purpose, which fails or is accomplished without a conversion, the power is extinguished and the land cannot be sold by virtue of it or treated as money, but it descends to the heir unless it is devised." On the other hand, in the *M'Cready* case (*supra*), we have an instance of a general power of sale. There the power was given in the second clause of

the will, and it was said: "If we examine critically this second clause of the will, we ascertain that the power of sale is associated with the widest latitude of management and control of the whole estate. We find that it is a power created at the beginning of the instrument before any dispositive provision is mentioned; that it stands separate from any other provisions of the will, and that it is not by necessary construction made inseparable from the trust which is created in the residuum of the estate." *Walter v. Tomkins*, 71 App. Div. 21, 75 N. Y. Supp. 557.

Power to sell and convey real estate for a specific purpose may preclude the idea that a mortgage may be made for that purpose. *Potter v. Hodgman*, 81 App. Div. 233; aff'd, 178 N. Y. 580.

¶ 208 Power of Sale; How Executed; Title.

Power to sell, mortgage or lease real estate may be executed by qualifying executors.

Where any power to sell, mortgage or lease real estate or any interest therein, is given to executors as such, or as trustees, or as executors and trustees, and any of such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said power made by the executors who shall qualify shall be equally valid as if the other executors or trustees had joined in such sale.

New section taken from former § 2642.

§ 2694, Code Civ. Pro.

To be executed jointly. See ¶ 177.

In the case of *Herriot v. Prime* (87 Hun, 95, 67 N. Y. St. Repr. 649, 33 N. Y. Supp. 970; aff'd, 153 N. Y. 5), the power to sell and dispose of the estate was given to two trustees, "In such manner and on such terms as they shall jointly consider beneficial and for the interest of my said estate, with full power to convey by deed *jointly and not singly*, as I might or could do if living."

In the case of *Hyatt v. Aguero* (14 Civ. Pro. 286, 17 N. Y. St. Repr. 746, 1 N. Y. Supp. 339), the authority to sell any part of his real estate was given "In their joint discretion — that is to say, one is not authorized to sell or exchange without the consent and co-operation of the other — and to give valid deeds of the

same to purchaser." In these two cases the provisions of the will were construed as clearly expressing the intention of the testator that the power thus given should not in any event be exercised by one only of his trustees.

Where a power of sale is given to executors and three are named, "and to any two of them," and only one qualifies — *held*, that he had power of sale. *Draper v. Montgomery*, 108 App. Div. 63, 95 N. Y. Supp. 904.

Where power of sale is given to executors, and only one qualifies, his sale is good. *Taylor v. Morris*, 1 N. Y. 341.

Where the appointment of a third executor depended upon the consent of a beneficiary, which was refused, sale by the survivors was held to be good. *Lane v. Hustace*, 154 App. Div. 636, 139 N. Y. Supp. 784.

Manner of execution of power of sale.

Sale of real estate situate within the state of New York, made by executors in pursuance of an authority given by any last will, unless otherwise directed in such will, may be public or private and on such terms as in the opinion of the executor shall be most advantageous to those interested therein.

§ 110, Decedent Estate Law.

A devise of real property to an executor or other trustee for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power.

§ 97, Real Property Law.

A power to an executor to sell real estate "as he shall deem expedient and for the best interests" of certain legatees named is a general power in trust in which the executor has no interest. Such a power is not well executed by a transfer to pay a debt of testator. *Russell v. Russell*, 36 N. Y. 581.

Where executors are given power of sale for purposes of division and distribution, although the real estate is absolutely devised, the estate vests in the devisees subject to the power. *Crittenden v. Fairchild*, 41 N. Y. 289.

Held power of sale not repugnant to the residuary devise. *Skinner v. Quin*, 43 N. Y. 99.

As to what property.

Power to sell real estate is good, although the same property is specifically devised. *Kinnier v. Rogers*, 42 N. Y. 531.

Title where power of sale is given. See ¶ 306.

Where the title to real estate is not given to the executor under a valid trust, but the same is given to a specific or residuary devisee and a power of sale given, the title vests in the devisee subject to the execution of the power of sale, and such devisee is entitled to the rents and profits until sale had. See ¶ 306. *Coann v. Culver*, 188 N. Y. 9; *Stevens v. Fogle*, 73 Misc. Rep. 417, 130 N. Y. Supp. 1082.

Title where devisee refuses to accept devise.

When the devised land is subject to incumbrances or charges, the devisee may refuse to accept the devise. In such a case the executor who has a power of sale ought to take possession of the property, protect it and rent it as a trustee for all interested parties, and apply the proceeds of sale and the rents to their proper purposes.

Partition.

Husband, being co-tenant with deceased wife, may maintain partition.

Where the will gives a naked power of sale and converts the real estate into personalty, the legatees and executor are not necessary parties in partition. *Bellinger v. Taylor*, 144 App. Div. 851, 129 N. Y. Supp. 435, 70 Misc. Rep. 139.

¶ 209 Equitable Conversion Under Power of Sale.

The law has been settled by a long line of authorities that where the power of sale given to the executors is discretionary and not mandatory, conversion will not be decreed unless there is an absolute necessity to sell in order to carry out the scheme of the will or unless the intention that there should be a sale is to be found in

the whole scope and tenor of the will. It was said in *Matter of Tatum* (169 N. Y. 514), which was a case where the power given to sell the real estate was discretionary only, that "unless the purpose of the testator will fail without a conversion, equity will not presume it. There should be an implication of a direction to convert, so unequivocal and so strong as to leave no substantial doubt in the mind. * * * Indeed, conversion, to be decreed, must be so necessary, as that, without it, the provisions of the will would be rendered unreasonable and incapable of a just and an effective operation." *Matter of Coolidge*, 85 App. Div. 295; aff'd, 177 N. Y. 541.

Conversion of real estate into personalty for an invalid purpose fails so far as such conversion was a part of the invalid purpose, and as to such he dies intestate and the same descends to his heirs-at-law. *Jones v. Kelly*, 170 N. Y. 401; aff'g, 63 App. Div. 614, 72 N. Y. Supp. 24.

Equitable conversion of personalty into realty.

A direction in a will to invest \$1,500 in real estate for the use of E. during life and then to the heirs of her body converts personalty into realty. *Webb v. Sweet*, 187 N. Y. 172; aff'g, 109 App. Div. 911.

Operates as a conversion.

A power of sale when exercised converts real estate into personal property, and as such it will be disposed of in accordance with the will or the intestate laws. *Moncrief v. Ross*, 50 N. Y. 431; *Wetmore v. Parker*, 52 id. 450; *Hatch v. Bassett*, 52 id. 359.

Absolute power of sale without discretion, not to be exercised until lapse of three years "at auction," may be exercised at any time at private sale and is an equitable conversion and the executor is accountable for rents. *Tickel v. Quinn*, 1 Dem. 425.

Held equitable conversion even though power of sale was not imperative. *Dodge v. Pond*, 23 N. Y. 69.

A direction to "divide" the real and personal estate held to be a valid power of sale and that it would be assumed that such sale

had been made and that the proceeds were in hand as personal property. *Gersen v. Rinteln*, 2 Dem. 243.

Conversion, and upon death of one party interested before actual sale his interest passed to his personal representative as personalty. *Fisher v. Banta*, 66 N. Y. 468.

From what time conversion is intended.

Where power of sale is given to pay debts and legacies, but the rents and profits are given until a sale, no conversion takes place until a sale is made. *Ogsbury v. Ogsbury*, 115 N. Y. 290; aff'g, 16 N. Y. St. Repr. 55; explained in 121 N. Y. 366.

Where the conversion was necessary, but not directed in express terms, the circumstances of that case required it to be held that conversion did not take place until the death of the life tenant. *Liveright v. Sternberger*, 131 App. Div. 13, 115 N. Y. Supp. 349.

Conversion Depends upon Intention.

It is the rule of law in this State that such intention must appear plainly, distinctly, and unequivocally. *Scholle v. Scholle*, 113 N. Y. 261; *Clift v. Moses*, 116 id. 144. An intention to convert may be manifested in various ways: *First*, by a positive direction to the executors or trustees to make it; *second*, the intention may be ascertained from the necessity of a sale, in order to carry out the general scheme of a testator; and *third*, the property may be deemed to be equitably converted, when the purpose of the testator would fail without such conversion. In *Phelps' Executor v. Pond* (23 N. Y. 69), it is said that where a testator authorizes his executors to sell real estate and it is apparent from the general provisions of the will that he intended the estate to be sold, the doctrine of equitable conversion applies, even if the power of sale is not mandatory. In that case it appeared that the will was incapable of execution, unless it were held that the property had been converted.

In *Asche v. Asche* (113 N. Y. 232), it is said that the necessity of a conversion to carry out the purpose of a testator will be

deemed to be a positive direction to convert; but in *Chamberlain v. Taylor* (105 N. Y. 185), it is remarked that an equitable conversion never will be presumed, unless it is required to carry out a lawful purpose expressed in the will of the testator. So also in *Matter of Tatum* (169 N. Y. 514), it is said that unless the purpose of the testator will fail without a conversion, equity will not presume it. If the property is to be deemed as equitably converted, it would become the duty of the executors or trustees to sell. In *White v. Howard* (46 N. Y. 144), it is said that in order to constitute the conversion of real estate into personal it must be the duty of, or obligatory upon, the trustees to sell it in any event. *Phoenix v. Trustees of C. Col.*, 87 App. Div. 438, 84 N. Y. Supp. 897; *Bascom v. Weed*, 53 Misc. Rep. 499, 105 N. Y. Supp. 459.

A will read: "Lastly: I hereby make, nominate, constitute and appoint my said husband Isaac N. Odell sole executor, of this my last will and testament, and hereby authorize and empower him in his discretion, to sell either at public auction or private sale, any and all of my real estate, and good deeds of conveyance give to the purchaser or purchasers; and I further direct, that he shall not be required to give security; hereby revoking all other or former wills by me made."

The husband was without means of support; and it was held that the wife intended to give the husband power to convert the real estate into property yielding a greater return and, therefore, authorized him to convey the real estate by virtue of his office. *Odell v. Claussen*, 120 App. Div. 535; 104 N. Y. Supp. 1104.

The gift of the whole residuary estate to the executors, accompanied by a power of sale, evinces a purpose of conversion.

In *Morse v. Morse* (85 N. Y. 53), Judge Andrews says:

"It is clear that the power of sale in the will in question was conferred for the purpose of conversion, and with a view to the distribution of the proceeds of the sale of the land among the testator's children. This is not expressly declared, but the prior gift of the whole residuary estate to them, followed by the power of sale to the executors, permits of no other inference."

The case of *Delafield v. Barlow* (107 N. Y. 535) is one of similar aspect, and there the court denied the right to partition upon the ground that there was an equitable conversion. *Salisbury v. Slade* (160 N. Y. 278) is also in the same line. So also are the cases of *Power v. Cassidy*, 79 N. Y. 602; *Matter of Russell*, 59 App. Div. 242; 69 N. Y. Supp. 563; *Horsfield v. Black*, 40 id. 264, 57 N. Y. Supp. 1006; *Matter of Faile*, 51 Misc. Rep. 166, 100 N. Y. Supp. 856.

¶ 210 Action in Equity May be Maintained to Enforce the Exercise of a Power of Sale to Pay Debts or Legacies.

“The power of sale thus given was imperative and imposed a duty on the executor, the performance of which might be compelled in equity for the benefit of the creditors, or the daughter. The debts were not made a charge upon the testator’s real estate; but a power to sell certain portions of it for their payment was given, the execution of which in nowise depended upon the will of the grantee of the power. Hence, the remedy of the creditor, upon the failure to exercise the power of sale, was by application to a court of equity. *Matter of Gantert*, 136 N. Y. 106. The sale of the real estate for the payment of the debts is not, as it is argued, to be effected, solely, through proceedings provided for in the Code of Civil Procedure. Section 2749 provides that a decree directing the disposition of real property, in a case where, under section 2750, Code Civ. Pro., the creditor of the decedent has instituted a proceeding for that purpose, can be made only where the property directed to be disposed of is not subject to a valid power of sale for the payment of the debts.” *Holly v. Gibbons*, 176 N. Y. 520, rev’g, 67 App. Div. 628.

Action to enforce power of sale where executors have discretion as to time of sale.

Walbridge v. Brooklyn T. Co., 143 App. Div. 502; 128 N. Y. Supp. 686.

CHAPTER XXXIX.

Ascertaining and Paying Debts and Funeral Expenses.

- ¶ 211. Duty to discover debts.
- ¶ 212. § 2677. Advertising for claims.
- ¶ 213. How and when claims should be presented.
- ¶ 214. § 2678. Notice to present claims and its effect.
- ¶ 215. Duty to examine claims and either admit or reject.
- ¶ 216. Duty to adjust claims fairly.
- ¶ 217. Representative may admit a claim and stop the running of the statute of limitations.
- ¶ 218. Character of such acknowledgment.
- ¶ 219. Statute of limitations.
- ¶ 220. § 2680. Effect of admission of claim.
- ¶ 221. § 2683. Debt or claim may be compromised.
- ¶ 222. Service of notice of rejection.
- ¶ 223. § 2681. Action on rejected claim.
- ¶ 224. Trial of claim on judicial settlement.
- ¶ 225. § 2684. Obtaining funds for payment of debts.
- § 2685. Directions as to value and sale of property.
- ¶ 226. § 2682. Preference in paying debts.
- Marshaling assets or securities.
- ¶ 227. Taxes as debts.
- Taxation of personal property against the representative.
- ¶ 228. Debts by judgment or decree.
- ¶ 229. Liens and secured debts.
- Legacy to widow in lieu of dower.
- ¶ 230. Funds applicable to payment of funeral expenses.
- ¶ 231. § 2686. Proceeding to compel payment of funeral expenses.
- ¶ 232. Collection of funeral expenses by action.
- ¶ 233. Reasonableness of charges for funeral, headstone and burial lots.
- Mourning apparel.
- ¶ 234. Funeral expenses as between husband and wife.

¶ 211 Duty to Discover Debts Due from the Deceased.

While the law prescribes a legal method of ascertaining and presenting debts due from the deceased, yet the representative is not justified in ignoring the knowledge which may come to him of just debts due from the deceased to other persons.

His duty as representative does not require him to use any trick or deceit to prevent a creditor having knowledge of the death of his debtor.

It oftentimes happens that the deceased was engaged in business and many persons who appear to be creditors upon his books might never see the published notice to creditors.

It is the duty of the representative to treat all persons interested in the estate fairly and to give all of such persons the requisite information to enable them to present claims in the proper manner, if they desire to do so.

The protection afforded by the statute concerning advertising for claims is only where the representative distributes in good faith. (See ¶ 214.) *Matter of Gill*, 199 N. Y. 155; *Matter of Recknagel*, 148 App. Div. 268; 132 N. Y. Supp. 99.

The personal representative of an estate is a trustee of the assets for the benefit of creditors and distributees. The rights of creditors, being prior to those of next of kin or legatees, the first duty of the representative is to ascertain and liquidate the indebtedness. The statute provides an expeditious and satisfactory mode of procedure in developing the indebtedness.

Examination of records for judgments.

A recorded judgment against deceased gives notice of its existence by its record, and all representatives should cause the public records to be examined to ascertain if there are any judgments upon record against the deceased. They are entitled to preference of payment. (See ¶ 228.)

Whether a representative will be personally liable if he fails to make such examination seems to be doubted. In *Matter of Recknagel*, 148 App. Div. 268; 132 N. Y. Supp. 99.

¶ 212 Ascertainment of Debts; Advertising for Presentation of Claims.

It is always desirable that the executor or administrator cause to be published the formal notice for the presentation of claims but the publication of such notice is not compulsory. It some-

times happens that the deceased had not for many years or never had been engaged in business and contracted few, if any, debts, and in such a case the executor or administrator is often willing to assume the responsibility of ascertaining and paying all debts.

In such cases the publication of a notice serves no practical purpose, except that the estate may be judicially settled at the expiration of the publication of the six months' notice to creditors, while if such notice be not published the estate cannot be judicially settled until the expiration of one year after the grant of letters. Where it is desired to publish the notice an informal application is made to the clerk of the court, naming the newspaper published in the county in which it is desired to have the notice published and stating to whom and at what place claims shall be presented; the clerk will then furnish a notice to be published in the designated newspaper for the period of twenty-six weeks.

Upon judicial settlement the printers' proof of publication should be filed.

Under the new practice.

The new practice emphasizes the desirability of advertising for claims, for as soon as advertisement has been completed, a judicial settlement may be had, or an accounting may be demanded, legacies become due, and if no notice is published within three months, a creditor may apply to have his debt paid in which case neglect to publish the notice will furnish a strong presumption that there are sufficient assets on hand to pay all claims.

There is a further distinct advantage to be gained by representatives if they publish the notice to creditors, as will be seen by reading section 2678 (¶ 214); for if a notice is published the representative will then be protected by such publication, if he pays out money properly, as against any claimant who fails to present his claim before the expiration of the notice.

Notice to creditors; affidavit of claimant.

The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or

newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant.

§ 2677, Code Civ. Pro.

Effect of revision. § 2718 amended.

Provisions in the former section regarding reference and trial of claims inserted in other sections. See §§ 2678, 2680, 2681.

Advertisement for claims by temporary administrator.

A temporary administrator is authorized to advertise for claims and such advertisement has the same effect as if made by the administrator-in-chief. See § 2598, Code Civ. Pro., ¶ 243.

¶ 213 How and When Claims Should be Presented.

Where a claim is presented to an estate pursuant to notice requiring the presentation of claims, the claimant is not understood as requiring immediate payment, but as claiming that in the due course of administration the claim should be adjusted. A claim, therefore, may very properly be presented before it is due. *Francisco v. Fitch*, 25 Barb. 130; *Cornes v. Wilkin*, 79 N. Y. 129; *Bankers Surety Co. v. Meyer*, 205 id. 219; Code Civ. Pro., § 1822. *International H. Co. v. Champlin*, 155 App. Div. 847; 140 N. Y. Supp. 842.

The terms "presentation" and "allowance" of claims in connection with administration are not mere vague and shadowy expressions; they each have a well defined legal signification. The representative, in passing upon the validity of claims against the estate, acts in a *quasi* judicial capacity; he should have some basis for such action other than assumed personal information. The basis contemplated by the statute is afforded by the claimant presenting to the representative a written statement of his demand, showing the amount and what it is for; the representative

may require such statement to be verified. *Matter of Brown*, 60 Misc. Rep. 35; 112 N. Y. Supp. 599.

The claim should be presented in writing.

Since by the recent amendment, section 2681, the rejection of a claim must be in writing, it is very desirable that the claim should be presented in writing, as was said in the *Matter of Morton* (7 Misc. Rep. 343; 58 N. Y. St. Repr. 515, 517, 28 N. Y. Supp. 82): "The statute plainly intends that the claim shall be presented or exhibited in some writing, stating its nature and amount, the owner's name and demanding its payment. The personal representative of the estate is then in possession of information which will enable him to act intelligently, and either to admit the claim or take such steps to protect the estate against it as he shall deem prudent and necessary." The following cases are to the same effect: *Cruikshank v. Cruikshank* (9 How. Pr. 350, 351); *King v. Todd* (27 Abb. N. C. 149; 15 N. Y. Supp. 156); *Roberts v. Ditmas* (7 Wend. 523); *Gansevoort v. Nelson* (6 Hill, 389); *Niles v. Crocker* (88 Hun, 312, 34 N. Y. Supp. 761, 68 N. Y. St. Repr. 579).

"While there is some conflict in the courts below upon this question, we think the cases to which we have referred establish a correct principle which should be adopted by this court." *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23 aff'g, 15 App. Div. 181, 44 N. Y. Supp. 493.

Claim presented by corporation or partnership.

Where a claim is presented by a corporation, the claim or affidavit should set out its correct corporate name, so that if it should be necessary to issue and serve a citation, the correct name may be inserted and proper service made. Where the claimant is a partnership it is especially necessary that the names of the persons composing the partnership be fully set out with their places of residence. This is necessary to give the representative the proper information in case it should become necessary to issue a citation to and serve it upon such claimant, and the repre-

sentative would be justified in returning a claim which did not contain such information.

A citation issued on a partnership claim, must be directed to the partners by their individual names, although it may be served upon one of them, and the claim or affidavit filed should give the representative this necessary information.

Waiver of presentation.

The representative may waive the presentation of the claim as a legal formality since the requirement is for the protection of the representative. Having by sufficient acts waived the formal presentation, he then stands in the same position as though the claim had been legally presented. *Matter of Miles*, 170 N. Y. 75; *Gansevoort v. Nelson*, 6 Hill, 389.

An administrator's knowledge of existence of a claim does not avoid the necessity of its due presentation. *Matter of Morton*, 7 Misc. Rep. 343, 58 N. Y. St. Repr. 515, 28 N. Y. Supp. 82; *Niles v. Crocker*, 88 Hun, 312, 68 N. Y. St. Repr. 579, 34 N. Y. Supp. 761.

Time of presentation.

Claims may be presented at any time after the representatives qualify and enter upon the discharge of their duties, and while they are entitled to a reasonable time to examine and decide upon the question of claims presented, when they do decide, even though no notice has been published, the effect of their decision is the same as though the claim was presented during publication. The notice is for the protection of representatives and the estate which they represent, and there is no absolute legal obligation to give it at all. *Field v. Field*, 77 N. Y. 294.

The only effect of a failure to present a claim to the representative is to relieve him from liability under this section. The creditor may wait as long as he pleases and then proceed against the next of kin or heirs-at-law. *Olmstead v. Latimer*, 9 App. Div. 163, 75 N. Y. St. Repr. 500; rev'd, on another point, 158 N. Y. 313.

Statement of claim.

The claim should be presented and exhibited in writing, stating its nature and amount, the owner's name, and demanding its payment. *Matter of Morton*, 7 Misc. Rep. 343; 58 N. Y. St. Repr. 515; 28 N. Y. Supp. 82.

It is not required that the claim presented shall be stated with legal precision. It is sufficient if the transaction out of which the claim arises is identified and its general character indicated without technical formality and the amount of the claim is stated. The party who presents a claim which is rejected cannot be permitted to evade the statute by successive presentations of claims founded on the same transaction, but varying in form or detail. *Titus v. Poole*, 145 N. Y. 414.

The affidavit.

The object of the affidavit is to prevent or check the presentation of unfounded claims — not to prove the existence of a debt, and such affidavit is not to be received in lieu of testimony where the payment of the debt is contested. *Osborne v. Parker*, 66 App. Div. 277; 72 N. Y. Supp. 894; *Matter of Goss*, 98 App. Div. 489, 90 N. Y. Supp. 769.

The presentation of a claim with affidavit attached may be waived by the representative. *Matter of Miles*, 33 Misc. Rep. 147, 68 N. Y. Supp. 368; rev'd, 61 App. Div. 562, 71 N. Y. Supp. 71; which was rev'd, 170 N. Y. 75.

The affidavit annexed to a claim is no proof of the claim where it becomes necessary to make proof of it. *Underhill v. Newburger*, 4 Redf. 499.

¶ 214 Notice to Present Claims and Its Effect.

The due publication of the notice to creditors exempts the representative from all liability to creditors whose claims are not presented, for any and all assets thereafter paid out in good faith. *Erwin v. Loper*, 43 N. Y. 521.

Notice to creditors is for the protection of the administrator or executor and there is no absolute legal obligation to give it at all. *Fliess v. Buckley*, 90 N. Y. 286.

A creditor having an unpaid debt against decedent, not barred by the statute, is not precluded by mere omission to present his claim pursuant to notice from establishing his debt and demanding an accounting at any time before the executor or administrator is formally discharged from his trust. *Matter of Mullon*, 145 N. Y. 98; aff'g, 74 Hun, 358, 56 N. Y. St. Repr. 347, 26 N. Y. Supp. 683.

The omission of the middle letter in the name of the decedent used in the notice to creditors is immaterial. *Cornes v. Wilkins*, 79 N. Y. 129; aff'g, 14 Hun, 428.

A notice to creditors which "requests" the presentation of claims instead of "requires" is sufficient. *Prentice v. Whitney*, 8 Hun, 300.

Effect of failure to present claim pursuant to notice.

If a claim against a deceased person be not presented to the executor or administrator within six months from the first publication of the notice to creditors, or, if no notice be published, within one year from the date of issue of letters, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such claim was presented.

§ 2678, Code Civ. Pro.

Effect of revision. New section.

This section is a part of former § 2718 rewritten. Under it, if a creditor does not present his claim within the times specified, the representative is relieved from all liability to him as to all money or property properly paid out or turned over before such claim was presented.

Rights of parties on presentation of claims after expiration of notice and after payment over of assets to creditors.

The evident purpose of section 2678 of the Code was that where an executor had advertised for claims and the period had expired, and every person whom he had reason to believe had any just claim

against the estate had presented his claim, and the executor had, thereupon, after such period had expired, gone ahead and paid such claims to the extent of such estate, or paid such claims and distributed the balance among the legatees, that then he should not be chargeable for so doing; but that the loss should be borne by the person who had neglected within the period to present his claim.

In the *Matter of Mullan* (145 N. Y. 98), the Court of Appeals, in referring to this question, states as follows (p. 104): "Where an executor or administrator proceeding in good faith, he being also residuary legatee, applies to his own use the assets remaining after having paid all the claims under the will and all claims presented in the usual course, pursuant to notice, he cannot, we think, be held accountable, except for the actual value of the assets which formed a part of the testator's estate."

In *Mayor v. Gorman* (26 App. Div. 191), the court says in considering this section of the Code, as follows (p. 199): "It is apparent, therefore, that the purpose and effect of the provision of section 2718 (now § 2678, Code Civ. Pro., under consideration, are, while permitting the claimant to liquidate his debt against the estate without costs, to limit him to such liquidation, so that the formal judgment shall not be chargeable upon any assets or moneys which the executors or administrators have lawfully paid out *after* the expiration of the statutory period of six months." *Matter of Gill*, 42 Misc. Rep. 457, 87 N. Y. Supp. 252; *aff'd*, 101 App. Div. 607, 91 N. Y. Supp. 1095.

Estate which has been paid over to a trustee by agreement of the persons interested has not been distributed according to law, and an action will lie to recover an unpaid debt from such fund. *City of N. Y. v. U. S. T. Co.*, 78 App. Div. 366, 79 N. Y. Supp. 1010; *aff'd*, 178 N. Y. 551.

Where there has been a partial distribution to creditors, and another is about to be made a creditor who has not presented his claim in time to share in the first distribution may be allowed on second distribution his *pro rata* share of the first distribution. *Home Ins. Co. v. Lyon*, 3 Dem. 69.

The administrators having published a notice to creditors to present their claims against the estate as authorized by law, and the time of publication having expired, and every claim presented having acquired the character of a liquidated demand against the estate by reason of such admission and allowance, the administrators are clothed with authority to apply the moneys in their hands to the *pro rata* payment thereof, and the law will protect them in so doing, if they act in good faith, as against the claims of creditors which may thereafter be presented. *Matter of Miner*, 39 Misc. Rep. 605, 80 N. Y. Supp. 643.

Action against next of kin, etc.

Failure to present the claim does not impair the right to maintain such an action. See ¶ 257.

¶ 215 Duty to Examine Claims and Either Admit or Reject Them Promptly.

All of the statutory provisions relating to the presentation of claims against the estate of a decedent and for determining their validity and amount are intended to disclose to an executor or administrator information as to the number and character of such claims and the alleged amount of each, and also to furnish a speedy and inexpensive method by which all claims not admitted and allowed by such executor or administrator can be established in whole or in part or wholly barred as a claim against the estate.

In the process of adjusting a claim against an estate by presentation to the representative, the latter is permitted, by section 2677 of the Code, to call for the evidence of the validity of the claim in its support, and it is a plain duty imposed upon him by virtue of his office to examine respecting its validity as a claim against the estate, and, if found to be just and valid, allow it, or, if otherwise, reject and offer to try it under the provisions of the statute. *Matter of Miner*, 39 Misc. Rep. 605, 80 N. Y. Supp. 643.

Settlement and adjustment of claim where counterclaim or offset exists.

In many instances the representative finds that the deceased had mutual accounts with others, and in all such cases he should

arrive at the balance due after adjusting such accounts and collect or pay the balance as the case may require. While in the case of insolvent estates this course may seem to give one creditor a preference over another, yet this is not in fact so since whether the estate is a creditor or debtor cannot be learned until a mutual balance is struck.

Whether a counterclaim or offset shall be allowed which is not of the nature of a mutual account depends upon the rules applicable to counterclaims and there provisions and cases should be consulted with reference to each particular case. See Code Civ. Pro., §§ 501-507, and such cases as *Lange v. Schile*, 117 App. Div. 233, 101 N. Y. Supp. 1080; *Schleuter v. Shano*, 49 Misc. Rep. 99, 96 N. Y. Supp. 716; *Thompson v. Whitmarsh*, 100 N. Y. 35; *Weeks v. O'Brien*, 25 App. Div. 206, 49 N. Y. Supp. 344.

Mutual accounts. See ¶ 131.

Where two parties deal together and each is known to the other to have an account against the other, these accounts are current, and the statute of limitations begins to run from the last item of either account. *Miller v. Longshore*, 147 App. Div. 214, 131 N. Y. Supp. 1041.

¶ 216 Duty to Ascertain Debts Due to and From the Deceased, and to Adjust them as Far as Possible.

Every representative of an estate, soon after he enters upon the discharge of his duties, must determine whether claims made against the deceased are honest and valid claims, and whether debts apparently due the deceased are actually due and the true and correct amount thereof. To do this he must make careful investigation in each case, and necessarily a large part of the information he is able to get must come from the creditor or debtor himself. If, after making such honest inquiry, he is satisfied that a certain debt is due from the deceased, he should pay it; or, if the deceased had a valid claim against a person, he should collect the amount due and release the debtor. He should not in ordinary cases take the position that the true facts will be difficult

or impossible of proof under section 829 of the Code of Civil Procedure and put either of such parties to his legal proof.

It is the duty of the representative to investigate and settle debts due to the estate as well as debts due from the estate. He must ascertain from all possible evidence the equities which exist in favor of the debtor, and he may then act and even release an apparent debt, and in doing so he will have the protection of the evidence upon which he acts, if it is sought to surcharge his account. *Scully v. McGrath*, 201 N. Y. 61; *Matter of Herrington*, 73 Misc. Rep. 182, 132 N. Y. Supp. 486.

Many representatives think that where the circumstances are such that they cannot admit a claim, they must reject it and so subject the estate to the expenses of litigation, rather than to exercise their judgment and discretion in adjusting unsettled claims.

It is their plain duty to act honestly and equitably with both debtors and creditors, and where it is possible, to settle and adjust differences.

May accept property or securities.

In the process of settling accounts, it may be proper to accept property or securities in settlement.

Where executors accept property in payment for a debt due deceased after proper effort to collect the debt they will not be charged with the balance of the debt above what the property brings. *Matter of Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

Security taken for debt of deceased must be enforced in name of representative. See ¶ 128.

Where an executor or administrator takes a chose in action as a new security for a debt or obligation due the deceased, he takes it in his representative capacity, and under sections 449 and 1814, Code Civ. Pro., he must sue upon it in his representative capacity. *Weeks v. O'Brien*, 25 App. Div. 206, 49 N. Y. Supp. 344; rev'g, 20 Misc. Rep. 48, 45 N. Y. Supp. 740.

An executor who takes a note and indorses it "as executor" is liable individually under the contract thus created. *Schmittler v. Simon*, 101 N. Y. 554, distinguishing *Tooker v. Arnoux*, 76 N. Y. 397.

May arbitrate.

Executors and administrators have the power to submit to arbitration disputed claims or demands in favor of or against the estate they represent. *Wood v. Tunnickliff*, 74 N. Y. 38.

May release a debt.

Where the representative has proof that a debt which is apparently existing, but which has been paid and settled before the death of the deceased, he is not obliged for his own protection to bring an action upon it, but he may release it.

An action for specific performance will lie to compel an executor to perform his contract to release a debt. *Sanford v. Story*, 15 Misc. Rep. 536, 74 N. Y. St. Repr. 557, 38 N. Y. Supp. 104.

Should retain a debt due from a distributee, legatee or devisee to the deceased. See ¶ 394.

In making adjustments and payments, no money should be paid or property turned over to a distributee, legatee or devisee, who owes a debt to the deceased, until such debt has been paid, or unless the same is deducted on such settlement. The debtor cannot object to such retention on the ground that the Statute of Limitations has run.

A debt due the deceased from a legatee is an asset and should be retained by the representative even though the Statute of Limitations has run against it. *Matter of Foster*, 15 Misc. Rep. 175, 72 N. Y. St. Repr. 140, 37 N. Y. Supp. 36.

Debt due from a legatee of income should be paid by retaining such income until the debt is satisfied. *Matter of Foster*, 38 Misc. Rep. 347, 77 N. Y. Supp. 922.

Representative may become a consenting creditor in bankruptcy proceedings.

An executor or administrator may become a consenting creditor, under the order of the surrogate's court from which his letters issued. A trustee,

official assignee, or receiver of the property of a creditor of the petitioner, whether created by operation of law, or by the act of parties, may become a consenting creditor, under the order of a justice of the supreme court. A person who becomes a consenting creditor, as prescribed in this section, is chargeable only for the sum which he actually receives, as a dividend of the insolvent's property.

§ 54, Debtor and Creditor Law.

¶ 217 Validity of Claim May be Admitted Expressly or by Implication.

As between the parties to the transaction — “the original parties” — the delivery of a bill by the creditor followed by the silence of the debtor may, when accompanied by a lapse of time, be *prima facie* evidence of the justice of the claim. This rule rests upon the principle of an admission implied from silence. But such silence must be the silence of knowledge. But in the case of an executor, his own knowledge of the justice of a bill for services rendered to his testator cannot be presumed to exist. The danger of the application of the principle of admission inferred from silence to the case of the presentation of claims to an executor is too great to be given judicial sanction. *Coombs v. Joerg*, 125 App. Div. 615, 110 N. Y. Supp. 6.

Silence of an executor after receiving a claim is not an admission of the claim, or a waiver of the right to raise the Statute of Limitations. *Schutz v. Morette*, 146 N. Y. 137; *Matter of Van Voorhees*, 55 Misc. Rep. 185, 106 N. Y. Supp. 355.

The doctrine that the lapse of a reasonable time without objection made transforms an account rendered into an account stated has a much more restricted application when the claimant deals with an executor, and the Court of Appeals refused to apply it when similar inaction of an executor followed the presentation of a claim, observing also that the creditor must see to it that the claim is admitted or allowed or else commence an action. *Schutz v. Morette*, 146 N. Y. 137. See also *Matter of Callahan*, 152 id. 320, 325; which rev'd, 87 Hun, 210, 33 N. Y. Supp. 1016.

The executor or administrator at any time before he shall have made distribution to claimants may make such an admission of

the validity of the debts as will bind him and all parties interested in the estate. *Wright v. Beirne*, 2 Dem. 539.

Delay by an executor in rejecting a claim against the estate does not establish it, so as to preclude the executor from disputing it afterward. *Matter of Clauss*, 16 App. Div. 34, 44 N. Y. Supp. 805.

Executor or administrator cannot revive a debt, but he may keep it alive.

There is a plain distinction between the right of an executor or administrator to revive an indebtedness against his deceased's estate which had been extinguished by law, and his right to acknowledge and to keep in force a subsisting obligation, by making payments from time to time upon the principal of the debt, or by way of keeping down interest. In the one case he creates an indebtedness, while in the other he is performing a moral obligation and is executing a duty recognized by law. *Matter of Kendrick*, 107 N. Y. 104; *Holly v. Gibbons*, 176 id. 520, rev'g, 67 App. Div. 628, 74 N. Y. Supp. 1132; *McLaren v. McMartin*, 36 N. Y. 88; *Butler v. Johnson*, 111 id. 204; *Hamlin v. Smith*, 72 App. Div. 601, 76 N. Y. Supp. 258.

A claim barred by statute cannot be revived by the executor's admission of its correctness nor by his promise to pay it. *Balz v. Underhill*, 19 Misc. Rep. 215, 44 N. Y. Supp. 419.

Where a debtor dies while a claim is valid and subsisting against him, his executor or administrator may make a payment thereon or in writing acknowledge the claim, and the result will be an extension of the life of the claim for six years. But the mere presentation and oral acknowledgment of the claim is not sufficient to prevent the running of the statute. *Cotter v. Quinlan*, 2 Dem. 29, 26 Barb. 316, 61 id. 190.

One of two administrators. See ¶ 179.

In New York one administrator can keep the debt alive by making partial payments thereon where it can be reasonably inferred that the payment is made with the consent of the other, *Matter of Bradley*, 25 Misc. Rep. 261, 54 N. Y. Supp. 555;

aff'd, 42 App. Div. 301, 59 N. Y. Supp. 105; or in fact without such consent, *Heath v. Grenell*, 61 Barb. 190.

¶ 218 Character of Acknowledgment which Prevents the Running of the Statute of Limitations.

An acknowledgment by a personal representative to be effective to keep alive a debt not barred by the statute must be in writing and signed by the representative and made to the creditor or some one acting for him. *Kendrick's Estate*, 15 Abb. N. Cas. (N. Y.) 189; *Vissscher v. Wesley*, 3 Dem. 301.

A written acknowledgment to be effective must be made under such circumstances that a promise to pay will be presumed. *Matter of Miller*, 15 Misc. Rep. 556, 74 N. Y. St. Repr. 299, 37 N. Y. Supp. 1129.

Acknowledgment by debtor.

An order upon a debtor given to a creditor for the payment of the amount of the indebtedness is an admission of the debt and of a willingness on the part of the debtor to pay the debt, and continues the debt for a period of six years from the date of such order. *Manchester v. Braedner*, 107 N. Y. 346; *Smith v. Ryan*, 66 id. 352.

The moral obligation to pay the debt has been held a sufficient and legal consideration, without any other, for the promise or undertaking to pay the debt, by acknowledgment, ratification, or a new promise. *Henry v. Root*, 33 N. Y. 526.

Payment by order of court.

Part payment by judicial order as in insolvency or *pro rata* distribution will not extend the statute, as it is not a voluntary payment by the representative. *Arnold v. Downing*, 11 Barb. 554.

Acknowledgment by petition or account.

Setting forth the name of a person as a "creditor" in a petition for judicial settlement, accompanied by a statement that the claim is disputed, is not an acknowledgment of the debt so that it is thereby kept alive. *Matter of Kendrick*, 107 N. Y. 104.

A typewritten statement of account furnished to the next of kin does not amount to a written acknowledgment from which a promise to pay will be presumed. *Matter of Elkins*, 74 N. Y. St. Repr. 299.

An admission or acknowledgment made in a proceeding to which the creditor seeking to benefit thereby is not a party is not effective to rebut the presumption of payment or to revive a debt due such creditor. *Matter of Kendrick*, 107 N. Y. 104.

Where the claimant is an involuntary party to an accounting in which account it is stated that the claim is rejected, such statement is not sufficient notice of rejection to set the short statute running. *Potts v. Baldwin*, 67 App. Div. 434, 74 N. Y. Supp. 655; aff'd, 173 N. Y. 335.

An administrator, being called to an account by an alleged creditor whose claim had been duly presented more than a year before, filed his account which included among the claims against the estate the claim of petitioner — *held*, a binding admission of the claim. *Wright v. Beirne*, 2 Dem. 539.

¶ 219 Statute of Limitations. See ¶ 131.

If the Statute of Limitations has once begun to run in the lifetime of a debtor, it does not cease running during the period which may elapse between his death and the granting of administration upon his estate. *Sanford v. Sanford*, 62 N. Y. 553.

Where the Statute of Limitations has begun to run during the life of the debtor, it does not cease running during the period which may elapse between his death and the granting of administration upon his estate, save that eighteen months after the death is by statute not to be deemed a part of the time limited (§ 403, Code Civ. Pro.). *Church v. Olendorf*, 49 Hun, 439, 19 N. Y. St. Repr. 700, 3 N. Y. Supp. 557; *Matter of Burdick*, 53 N. Y. St. Repr. 842, 24 N. Y. Supp. 346.

Section 403, Code Civ. Pro., extending the time eighteen months in which to bring an action against an executor or administrator does not extend the time in which an executor or administrator

may keep alive a judgment by acknowledging or paying thereon. *Matter of Kendrick*, 107 N. Y. 104.

Where letters were issued two years before the expiration of the period of limitation the statute is extended eighteen months — not two years and six months. *Church v. Olendorf*, 49 Hun, 439, 19 N. Y. St. Repr. 700, 3 N. Y. Supp. 557.

When Statute of Limitations begins to run under general hiring.

Where services are rendered under a general retainer year after year without any express agreement as to the time or measure of compensation or the term of employment — no payments being made — the law for the purpose of determining when the Statute of Limitations begins to run will not imply an agreement that the payment of compensation shall be postponed until the termination of the employment, but will regard the hiring as from year to year and the wages as payable at the same time. *Davis v. Gorton*, 16 N. Y. 255. *In re Gardner* (103 N. Y. 533), the Statute of Limitations is a bar to a claim for more than six years of services in such employment immediately preceding the death of the decedent, unless it appears that payments have been made to apply thereon within six years, in which case a recovery is proper for a period beginning six years prior to the first of said payments. *In re Stewart's Estate*, 21 Misc. Rep. 412, 47 N. Y. Supp. 1065.

Services of attorney; separate suits.

Where the claim of an attorney for compensation covers services in separate actions, the statute begins to run on each at the entry of final judgment. A later employment in another action does not draw after it the claim for services performed in the former action. *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 id. 306.

But the litigation must be terminated by settlement or judgment before the statute begins to run. A suspension of the litigation for more than six years does not bar the claim, if another move is made in the case which is within the six years. *Bathgate v. Haskin*, 59 N. Y. 533.

Since for various purposes specified in the Code of Civil Procedure the authority of the attorney continues after final judgment, the consent of the client to his so acting is presumed. *Commercial Bank v. Foltz*, 13 App. Div. 603, 43 N. Y. Supp. 985.

When the attorney for a representative performs necessary and proper services for his client after a decree of final settlement is entered, the statute will not begin to run at the date of such entry. To complete the settlement of the estate under the decree there must often be a distribution and the preparation and filing of releases, the transfer of securities and bank accounts and other matters closed up in order that the representative may be fully relieved from further liability, and properly perform his duties.

If services are actually performed in any of these or similar matters, the relation of attorney and client has not ended with the entry of the decree and the statute will not begin to run so long as the client continues to use the attorney in the actual final settlement of the estate.

¶ 220 A Duly Admitted Claim Acquires the Character of a Liquidated and Undisputed Debt.

Claims presented to administrators and admitted and allowed by them acquire the character of liquidated and undisputed debts against the estate. *Lambert v. Craft*, 98 N. Y. 342; *Magee v. Vedder*, 6 Barb. 352-354; *Schutz v. Morette*, 146 N. Y. 137. The latter case limits the rule laid down in the two former ones as regards the effect of mere silence and inaction of administrators on claims presented, but does not disturb the rule itself that the admission and allowance of the claim give it the character of a liquidated and undisputed debt; but on the other hand it recognizes the rule and the effect of such action in holding that an executor may state an account of the dealings of his testator and an action on the account so stated will lie against him in his representative character.

The duty of the creditor is not fully done when he presents his claim; he should see that the representative takes some affirmative action in regard thereto.

When the creditor properly presents his claim and procures the same to be allowed by the representative he derives the advantage of having his claim thereby *prima facie* established as a liquidated demand against the estate. *Matter of Brown*, 60 Misc. Rep. 35, 112 N. Y. Supp. 599.

Admitting stops running of Statute of Limitation. See ¶ 401.

If a claim is presented before the Statute of Limitations has run, and before that time the claim is properly admitted and allowed, the claim becomes liquidated as much as it would if judgment had been obtained, and should not be disallowed upon judicial settlement on the ground that at the date of the judicial settlement the statute had run. *Matter of Nelson*, 63 Misc. Rep. 627, 118 N. Y. Supp. 673.

Effect of admission and allowance of claim or debt by representative.

Whenever upon any accounting or judicial settlement of an account, the executor or administrator admits and allows a claim or debt against the deceased, other than his own claim, or has theretofore in writing admitted or allowed such a claim or debt, the validity of such claim or debt shall be thereby established.

When such a claim or debt has been so admitted or allowed, or a judgment against the executor or administrator has been obtained, whether either has been paid or not, any party adversely affected thereby may file objections thereto and may show that the claim or debt was fraudulently or negligently allowed, or paid, or that the judgment was obtained by fraud, negligence or collusion. If the surrogate shall sustain the objections in a case where the claim or judgment has not been paid, the claim shall be deemed to be rejected by the accountant at the time of such determination, and the time between the presentation of the claim, or the commencement of the action where the claim was not presented, and the time of such determination shall not be a part of the time limited in this act for commencing an action thereon.

§ 2680, Code Civ. Pro.

Effect of revision. New section.

This new section places much more responsibility upon the representative in the allowing of claims than the former law did. Because of this responsibility the representative will be likely to give more careful consideration to claims and act with proper consideration.

Under this section the allowance of a claim in writing, whether it is paid or not, establishes it upon the final accounting, unless it is objected to, and in case it is objected to, the objector must show that the claim was fraudulently or negligently allowed or paid. That does not mean that in all cases the validity of the claim would then be tried, but rather that the objector must show that there existed a good defense to the claim, so that the surrogate would be required to find from the evidence that the representative was negligent in himself deciding upon the validity of the claim, instead of rejecting it, or that he fraudulently allowed it knowing that it was an invalid claim.

If in such a case the claim has been paid, the representative is surcharged in his account, but if it has not been paid, the statute automatically rejects it, and suit must be brought upon it within three months or the claimant may consent in open court to have the claim tried then and there, or on an adjourned day.

This section now puts an admitted claim upon practically the same footing as a judgment has always been.

If the representative allows the claim it becomes a valid obligation against the estate. If objected to the burden of sustaining the objection is upon the objector, and such issue may be tried without filing a consent. *Matter of Warrin*, 56 App. Div. 414, 67 N. Y. Supp. 763, rev'g, 28 Misc. Rep. 695; *Matter of Prince*, 56 Misc. Rep. 222, 107 N. Y. Supp. 296; *Matter of Strickland*, 22 N. Y. St. Repr. 901, 5 N. Y. Supp. 851.

The law stated in the *Warrin* case has long been recognized and grows out of the principle that, when a claim has once been liquidated or established, it is not necessary for the claimant to establish such claim a second time, unless mistake, fraud or bad faith is shown in the first liquidation of the claim. *Matter of Nelson*, 63 Misc. Rep. 627, 118 N. Y. Supp. 673.

¶ 221 Application for Permission to Compromise a Debt or Claim.

Disputed or unsettled debt or claim may be compromised, compounded or sold.

Upon the application of an executor, administrator, guardian or testa-

mentary trustee, the surrogate may, for good cause shown, authorize the compromising or compounding of any debt, claim or demand, due or to become due, which it is necessary to settle, adjust or liquidate in connection with the settlement of an estate or fund; and the selling at public auction, on such notice as the surrogate prescribes, of any uncollectible, stale or doubtful debt or claim belonging to the estate or fund; but any party interested in the final settlement may show on such settlement that such debt or claim was fraudulently compromised or compounded.

§ 2683, Code Civ. Pro.

Effect of revision. New section.

The substance of this section was taken from former section 2719.

It is not in every case where the representative desires to settle or compromise a claim that application to the surrogate for permission to do so should be made. The executor or administrator is appointed for the purpose of conducting the business of the estate and of exercising a careful and intelligent judgment as to such business. Unless the matter is of very great importance and he considers that there are questions involved upon which he ought to take the advice of the surrogate, the representative should assume the responsibility which attaches to his office and act upon his own best judgment. Where such an application is made to the surrogate, the order permitting a settlement or compromise furnishes no absolute protection to the representative, since any party interested in the final settlement of the estate may show on such settlement that such debt or claim was fraudulently or negligently compromised or compounded.

An executor or administrator, independent of a statute, has the power to compromise and adjust claims made either against or in favor of estates represented by him, the only risk in doing so being that unless the surrogate or a court having jurisdiction of the subject-matter thereafter sustains his acts he will be subjected to a personal liability. *Chouteau v. Suydam*, 21 N. Y. 179. The first statute bearing upon the subject is chapter 80 of the Laws of 1847. This act was amended in 1888, chapter 571, which permitted a surrogate to authorize executors and administrators "to compromise or compound any debt or claim," and while it

might be argued with some force that this language was sufficient to confer power upon the surrogate to authorize the settlement of a claim made against the estate, it probably was not so intended — at least it is not sufficiently clear that such was the intent — when the whole act is considered, as to justify the court in thus construing it. But whatever doubt may have existed in this respect prior to 1893 was removed by the passage of chapter 100 of the laws of that year, by which section 1 of the original statute of 1847, as amended in 1888, was further amended by adding the words: “Or to compromise or compound any debt or claim owing by the estate of their testator or intestate.” The words thus added, taken in connection with the other words used, clearly and unmistakably indicate an intent upon the part of the Legislature to confer power upon the surrogate to permit a settlement or compromise of a claim either made for or against the estate. But it is said that chapter 100 of the Laws of 1893 was repealed by chapter 686 of the same year. This is undoubtedly true, but in repealing the original statute of 1847 and the amendment of 1888 the amendment which was thereby added to section 2719 of the Code of Civil Procedure evidences that the Legislature intended to continue the power which had theretofore been conferred upon the surrogate with reference to a settlement or compromise and not to diminish it.

Considering, therefore, the history of the legislation bearing on the subject, which has all finally culminated in section 2719 (now § 2683) of the Code, and the evident purpose to be accomplished by that section, the Legislature intended to confer power upon a surrogate to permit a settlement and compromise of any claim whether it be for or against the estate. *Matter of Gilman*, 92 App. Div. 462, 87 N. Y. Supp. 128; *aff'd*, 178 N. Y. 606. See also 82 App. Div. 186, 81 N. Y. Supp. 713.

The language used in the amendment of 1914 is even more explicit and clear and leaves no doubt of the authority to settle by compromise any debt or claim which it is necessary to adjust in order to settle the estate.

Authority may be given as well where the liability of the debtor is doubtful as where his responsibility is doubtful. *Shepard v. Saltus*, 4 Redf. 232.

Application should set forth reasons.

Care should be taken that the petition sets forth good and sufficient reasons for the compromise, so that the court may make an order based upon sufficient information. *In re Brush's Estate*, 148 N. Y. Supp. 254.

Compromise of interest of deceased in certain corporations.

Where testator was interested in speculative concerns, his executor was allowed to compromise and settle his interest therein. *Matter of McCabe*, 55 Misc. Rep. 484, 106 N. Y. Supp. 679.

¶ 222 Service of Notice of Rejection of Claim Should be Made upon the Claimant, but May be Made upon Claimant's Attorney or Agent.

The safer practice is to serve a written rejection of the claim upon the claimant personally. The notice should be written so that there may be no question about the fact of rejection of the claim and it should be served upon the claimant so that there may be no question about the claimant having personal notice of the rejection and of its date.

The case of *Van Saun v. Farley* (4 Daly, 165), holding that service upon the attorney is not sufficient has been criticised and not followed.

Where on presentation of the claim by a person other than the claimant the executor then and there told the bearer of the claim that he disputed and rejected it — *held*, a sufficient rejection. *Peters v. Stuart*, 2 Misc. Rep. 357, 51 N. Y. St. Repr. 120; rev'g, 1 Misc. Rep. 8, 48 N. Y. St. Repr. 511, 20 N. Y. Supp. 661.

The rule is stated in *Dillon v. Anderson* (43 N. Y. 231, 238) as follows: "Notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for

the principal in the course of the very transaction which becomes the subject of the suit."

Where a written notice of rejection was left at the house of claimant during a temporary absence — *held*, a sufficient rejection. *Peters v. Stuart*, 2 Misc. Rep. 357, 51 N. Y. St. Repr. 120, rev'g, 48 N. Y. St. Repr. 511.

It is entirely immaterial whether the plaintiff was ever informed that the claim had been rejected by the administrator, if such was the fact, the witnesses referred to having been authorized to present such claim. *Cox v. Pearce*, 112 N. Y. 637; *Gardner v. Pitcher*, 109 App. Div. 106, 95 N. Y. Supp. 678; aff'd, 185 N. Y. 534.

Where a claim was presented by a firm of attorneys and the firm name and address was the only address indorsed upon the claim, a written rejection served upon a member of the firm was held a sufficient rejection. *Lockwood v. Dillenbeck*, 104 App. Div. 71, 93 N. Y. Supp. 321.

When an executor notifies the claimant that as at present advised he declines to pay the claim and asks for the items of the account, etc., he has not rejected the claim. *Hoyt v. Bonnett*, 50 N. Y. 538.

Service of notice of rejection by mail extends statute.

Under section 2681, it is plain that the claimant is given three months after rejection in which to commence his action. The three months provided for in section 2681 is "the time" within which the "claimant must do an act" after the claim is rejected, and comes clearly under the provisions of section 798 in regard to service through the post-office. *Matter of Smith*, 58 Misc. Rep. 493, 111 N. Y. Supp. 1085.

When service is made on the attorney personally, and also on the claimant by mail, it was held that the claimant might rely upon the latter service as increasing his time in which to sue. *Miller v. Longshore*, 147 App. Div. 214, 131 N. Y. Supp. 1041.

Negotiations after rejection.

Where after rejection, the representative continues to negotiate for a settlement he will not be allowed to plead the running of the statute without deducting the time negotiations were in progress. *Adler v. Davis*, 31 Misc. Rep. 47, 63 N. Y. Supp. 241.

Under the facts of another case a different conclusion was reached. *Dawbarn v. Fleischmann*, 146 App. Div. 57, 130 N. Y. Supp. 397.

Effect of filing consents. Decided under former section.

Consents of both parties having been filed, an action brought in the Supreme Court cannot be maintained after the expiration of the six (now three) months' limitation. The claimant must stand on his consent. *Clark v. Scovill*, 111 App. Div. 35, 97 N. Y. Supp. 1117; app. diss., 185 N. Y. 541.

Effect of stay granted by court.

A stipulation to stay all proceedings in a claim made by order of court stops the running of the short statute. *Wilder v. Ballou*, 63 Hun, 118, 17 N. Y. Supp. 625, 43 N. Y. St. Repr. 514.

Creditor may object.

Although the representative may in some cases be denied the privilege of disputing his consent and its effect, yet a creditor having a valid claim against an insolvent estate may make any legal object to the consent or raise the statute of limitations. *Matter of Bork*, 55 Misc. Rep. 179, 106 N. Y. Supp. 361.

Claim not yet due.

Under the former practice which required the consent of the representative to be acknowledged and filed before a claim could be tried on judicial settlement, a creditor who had a claim, not yet due on which he could not maintain an action was at the mercy of the representative, as was the case of the creditor in *Bankers Surety Co. v. Meyer*, 205 N. Y. 219. Under the present practice the representative is required to consent to an adjustment of all claims on judicial settlement.

¶ 223 Action on Rejected Claim Must be Brought, or Claim Tried on Judicial Settlement.

Rejected claim to be tried on judicial settlement; limitation of action by creditor.

If the executor or administrator doubts the justice or validity of any claim presented to him, he shall serve notice in writing upon the claimant that he rejects said claim or some part of it, which he specifies, and that he will submit such claim, or the part of it specified, for trial and determination on the judicial settlement of the account of the executor or administrator.

Unless a written consent shall be filed by the claimant in the surrogate's office that said claim be heard and determined upon the judicial settlement of the account of said executor or administrator the claimant must commence an action for the recovery thereof against the executor or administrator within three months after the rejection, or, if no part of the debt is then due, within two months after a part thereof becomes due; in default whereof said claimant, and all the persons claiming under him are forever barred from maintaining such an action. But, in such case, the claim shall be tried and determined upon such judicial settlement, and if the claimant consents to such trial within the time limited for commencing such action he shall thereby waive the right to begin such action.

§ 2681, Code Civ. Pro.

Effect of revision. New section.

Part of former section 1822 has been incorporated into this section, and a separate bill was introduced by the recent revisers for the repeal of section 1822, but for some reason the separate bill, with others amending other sections of the code not contained in chapter XVIII did not pass the Legislature. It will be necessary therefore for the courts to construe section 1822 as being repealed by implication in order to put into full effect the new plan of the revisers for the rejection and trial of claims. This section now provides the following procedure for rejecting a claim and getting it before the court for trial. If the representative does not allow a claim, but doubts its justice or validity, he must reject it in writing and state that he will submit such claim to the surrogate's court for trial on the judicial settlement.

When the claimant receives this notice, he may sue his claim in Supreme Court at any time within three months, not six months as heretofore. If he does not wish to sue in the Supreme Court, he may at once file his consent to have the claim tried on

judicial settlement, and by so doing he will, in some instances, enable the representative to have his judicial settlement at an earlier date, than he would be able to have it if he had to wait until the expiration of the three months. If, however, he does not file his consent, and allows the three months to expire without bringing suit, he is not deprived of his right to have the trial of his claim on the judicial settlement, for such trial does not depend upon his filing his consent, as it did under the former practice. Now the right to a trial is not lost, for if not had by action, it must be disposed of on judicial settlement.

Either party on judicial settlement may demand a jury trial.

This section does not prevent a creditor from putting his claim into judgment if he desires to do so. *Mayor, etc., of N. Y. v. Gorman*, 26 App. Div. 191, 49 N. Y. Supp. 1026.

Reference of claim.

The special provision for reference of a claim has been repealed, but a claim, like other issues, may be referred under the general provisions of section 2536. ¶ 15.

Where some of the items of the claim are rejected and others admitted the statute begins to run as to the rejected items at the time of rejection. *Wintermeyer v. Sherwood*, 77 Hun, 193, 60 N. Y. St. Repr. 131.

Whether a claim has been admitted or rejected is always preliminary.

The surrogate may determine whether a claim has been properly presented, allowed or rejected. *Matter of Scheetz*, 62 Misc. Rep. 166, 116 N. Y. Supp. 428.

The question as to the acceptance or rejection of the claim and the application of the Statute of Limitations may be referred, under authority of section 2536, Code Civ. Pro. *Matter of Hoes*, 54 App. Div. 281, 66 N. Y. Supp. 664.

No "Short Statute of Limitations" Under Present Practice.

Under the new practice there is no so-called short statute of limitations, since the claimant may have the benefit of his trial of a claim upon the judicial settlement without any action upon

his part, except to appear upon judicial settlement and submit his claim and his evidence. Under this practice an honest claimant cannot lose his claim on account of his own or his attorney's incompetence or negligence. The "short statute" is only created with reference to his right to a trial of his claim in the Supreme Court. That right, if it is a right, he may forfeit by failing to bring such action within three months, but the right of every claimant to have his claim tried before the surrogate cannot under the present practice be lost by any laches or technicality. The present condition of the law is particularly desirable because many persons having claims against estates are ignorant of legal forms, and are under the impression that the surrogate will protect their right, and that it is not necessary to employ an attorney to prevent the law from doing them the injustice of denying their right to have their claims heard before the surrogate.

Sections 401 and 405 apply. Decided under the former section.

Where the executor at the time of the death of the testator and ever since had been a resident of another State, section 401 applies to bringing an action on a rejected claim and such action is not barred by the six months' limit. *Hayden v. Pierce*, 144 N. Y. 512; aff'g, 71 Hun, 593, 55 N. Y. St. Repr. 117, 25 N. Y. Supp. 55.

Where an action has been commenced on a rejected claim and a nonsuit granted, section 405, Code Civ. Pro., applies and extends the time to bring a new suit one year therefrom. *Titus v. Poole*, 145 N. Y. 414; aff'g, 73 Hun, 383, 58 N. Y. St. Repr. 75, 26 N. Y. Supp. 451.

Absence from the state of the executor during a part of the six months does not interfere with the running of the statute. *Dawbarn v. Fleischmann*, 146 App. Div. 57, 130 N. Y. Supp. 397.

Infancy of claimant.

Where claimant is an infant the short statute cannot be set up against his claim, since he comes within the protection of section

396, Code Civ. Pro. *Matter of Cashman*, 62 Misc. Rep. 598, 116 N. Y. Supp. 1128.

Where the claim of an infant had been rejected, and the infant had been cited on judicial settlement, a special guardian was appointed and he was permitted to file a claim on behalf of the infant as though no claim had been filed and rejected. *Matter of Brooks*, 65 Misc. Rep. 439, 121 N. Y. Supp. 1092, 71 Misc. Rep. 102.

¶ 224 Nature of Claims Which May be Tried on Judicial Settlement.

Any and all claims may be tried on judicial settlement which are necessary to be determined to enable the surrogate to make a full and complete decree. Section 2510. When a consent of both parties was a necessary prerequisite to the trial of a claim, and the jurisdiction of the surrogate was incomplete as it was under the former practice, certain classes of claims and of questions, could not be tried by the surrogate, even by consent.

History of provisions for trial of claims by surrogates upon judicial settlement.

Prior to the amendments, in 1895, of the provisions of the Code of Civil Procedure (§§ 1822, 2743) a surrogate had no jurisdiction to try or determine disputed claims against an estate (*McNulty v. Hurd*, 72 N. Y. 518; *Matter of Callahan*, 152 id. 320; *Matter of Edmonds*, 47 App. Div. 229, 62 N. Y. Supp. 652), and the consent of the parties did not confer jurisdiction or estop a party from raising the question on appeal from the decision of the surrogate. *Matter of Walker*, 136 N. Y. 20, 48 N. Y. St. Repr. 893.

Section 1822 of the Code provided for the limitation of actions by a creditor on a rejected claim. Prior to the amendment of 1895 the section provided, in effect, that the action must be commenced within six months after the rejection of the claim "unless the claim is referred, as prescribed by law." Laws of 1882,

chap. 399. By the amendment in 1895 the words quoted, "unless," etc., were omitted, and there were inserted, in place thereof, the words "unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator, as provided by section 2743." Laws of 1895, chap. 595.

Section 2743 related to the decree to be made upon a judicial settlement, and prior to the amendment of 1895 it provided, among other things, that "where the validity of a debt, claim or distributive share is not disputed or has been *established* the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same." Laws of 1880, chap. 178. Under this language it was held that the surrogate had no jurisdiction to try and determine disputed claims against estates. The claims had to be *established* in some other tribunal than before the surrogate. By the amendment of 1895 the phraseology was changed and the following words were inserted after the word "established," "upon the accounting or other proceeding in the Surrogate's Court or other court of competent jurisdiction." Laws of 1895, chap. 595.

These amendments to these two sections were made by the same act, and should be considered together in determining what new jurisdiction was intended to be conferred upon the surrogate or his court in reference to the trial and determination of disputed claims against estates. So considering the amendments, it is evident that it was intended to give the surrogate jurisdiction to try and determine such claims upon the judicial settlement of the accounts of the executor or administrator upon the written consent filed with him by the respective parties. What was intended by the words in the amendment of section 2743, Code Civ. Pro., "or other proceeding in the Surrogate's Court," it is difficult to say. It does not seem that the intention was to confer jurisdiction to try and determine such claims in any cases other than these referred to in section 1822, Code Civ. Pro., and

those were "upon the judicial settlement," etc., only. If the intention was to confer jurisdiction to try and determine such claims generally, when consent of the parties was given, such intention would have been more clearly expressed, especially as it had been held that no jurisdiction to try and determine such claims existed at all prior to such amendments of 1895. *Matter of Clark v. Hyland*, 88 App. Div. 392, 84 N. Y. Supp. 640.

Until then the policy of the law had been to withhold all jurisdiction from the surrogate and his court to try and determine disputed claims against estates. And even the jurisdiction conferred by these amendments was carefully limited to the judicial accountings where all the parties interested in the estate were privileged to be present and to take part in the litigation, and even then to cases where the written consent by the parties to the exercise of such jurisdiction should be filed. It cannot, therefore, be held that the surrogate has jurisdiction to try and determine a disputed claim even with the consent of the parties, at any other time than during the judicial settlement of the accounts of the executors of the estate. That settlement is a well-understood proceeding in Surrogates' Courts duly instituted, on notice to all parties interested in the estate. *Matter of Clark v. Hyland*, 88 App. Div. 392.

By the revision of 1914 many of these sections were amended, but direct authority was given by section 2510 and by section 2681 to the Surrogate's Court to try on judicial settlement all claims against decedents' estates. The representative being an officer and creature of the court was required to consent to such trial, and the claimant was required to submit to such jurisdiction, if he failed to invoke the jurisdiction of the Supreme Court within three months after the rejection of his claim by the representative.

Decree on Trial of Claim.

After trial of a claim before the surrogate the usual practice is to insert in the decree of judicial settlement the decision allow-

ing or disallowing the claim in whole or in part. This is good practice when it is known that there is to be no appeal from the decision. If an appeal be taken in such a case it must be from the decree or that part of it, and in such a case, the rights of the parties being fixed by such decree, if the decision be sustained there is no fund from which to pay the expenses of appeal incurred by the representative. Where an appeal is anticipated, the better practice is to enter a special decree allowing or disallowing the claim, and defer making a decree upon judicial settlement until the question at issue is decided, when such a decree can be made as justice requires.

¶ 225 Obtaining Funds for the Payment of Debts.

It is the duty of the representative to proceed to pay the debts of the deceased as soon as he is sure that there are sufficient assets of the estate to pay them in full.

Sometimes this cannot be safely done until the expiration of the publication of notice to creditors, but often it can be begun at once. If sufficient cash for such purpose be not on hand, the personal assets must be converted into cash.

The representative is authorized to sell the personal property for such purpose.

Sale of personal property for payment of debts or legacies.

An executor or administrator may sell the personal property of the deceased at any time for the payment of debts, or legacies, or for making distribution. The sale may be public or private, and may be on credit not exceeding one year, with approved security. Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts.

§ 2684, Code Civ. Pro.

Effect of revision. § 2717 amended.

The substance of the former section still remains. The exception mentioned in section 2736 is where the interested parties have consented to take certain property in kind. See ¶ 473.

Part of the former section transferred to section 2733. ¶ 398.

The section applied.

Section 2684, Code Civ. Pro., does not render a sale by an executor of an estate of a chose in action invalid. That section merely points out what must be done by an executor where there are not sufficient funds available with which to pay debts and legacies. The right of an executor or an administrator to sell the property, or choses in action, of his decedent without resort to this section, has never been questioned. *Huck v. Kraus*, 50 Misc. Rep. 528, 99 N. Y. Supp. 490.

Sale of uncollectible debts.

The surrogate may authorize the representative to sell at public auction on such notice as he may prescribe, any uncollectible, stale, or doubtful claim or debt belonging to the estate.

It is not necessary in every case to apply to the surrogate for authority to sell claims, for it is the duty of the representative to make the best possible collection of all assets and to do that he may use his best judgment as to the method to be pursued.

Notice of sale.

Where there are not sufficient assets to pay all creditors in full, the surrogate will direct notice of sale to be given to all creditors, but if there are sufficient assets, such notice will be required to be given only to the next of kin or legatees.

Reasonable notice as to time and publicity will be required to be determined by the facts of each case.

Sale upon credit; approved security.

It will be observed that the executor has no right to sell upon credit, except for the payment of the debts and legacies of the deceased. In commercial dealings between private individuals and corporations, notes, bonds, stocks, and other forms of contract may be taken for or as security for debts and other purposes, and may be recognized between the parties and by courts under the name of "securities;" but in legal proceedings the law requires security of a different character, and over which

the courts have control — a security which makes the debt assured; something which makes its payment certain, which makes sure the performance of a contract, and prevents loss from insolvency or otherwise.

The settlement of estates is a special proceeding, under the supervision and control of the courts; and though the Code says that an executor or administrator may sell on credit for certain purposes with approved security, approved security means national and state bonds, and mortgages on real estate, because it is an investment for the time being of the assets of the estate, and courts have held rigidly to the rule that if trustees, without express authority in some legal form, invest in notes, stocks, or bonds, they will be held responsible for all losses occasioned by such investments. The courts, in so deciding, have imposed no harsh nor unreasonable rule upon them in the discharge of their duties, but have given them a safe, simple, and reasonable rule of conduct, easily complied with, and in obeying which they assume no risk, and the estate they represent can sustain no loss. *Matter of Woodbury*, 13 Misc. Rep. 474, 70 N. Y. St. Repr. 183, 35 N. Y. Supp. 485.

Purchaser of assets cannot offset debt.

Where an executor or administrator sells assets on credit the purchaser cannot offset against the purchase money a debt due from the deceased to him. *Thompson v. Whitmarsh*, 100 N. Y. 35.

A rejected claim against which the short statute had run, could not, before the change in the law, be used as an offset or counterclaim. *Van Ness v. Kenyon*, 208 N. Y. 228.

Surrogate's court may make direction as to the value, manner and time of sale of property.

Whenever the assets of an estate consist of real property which an executor is authorized to sell, or of personal property which it is necessary or proper to sell, and the value of the same is uncertain or is dependent upon the time and manner of sale thereof, the executor or administrator may apply by petition to the surrogate having jurisdiction of the settlement of the estate, for advice and direction as to the propriety, price, manner and time of sale

thereof. If the surrogate, in his discretion, entertains the application, notice of such application shall be given to all persons interested or to such persons as the surrogate by order directs to have notice, in such manner as the surrogate shall prescribe. The surrogate shall inquire into the facts and circumstances and may hear the opinions of witnesses as to the value of such property and as to the best manner and time of sale thereof, and may give such advice and direction as shall seem to him for the best interest of the parties. A substantial compliance with the authorization so given shall relieve the said executor or administrator from any charge or objection that the said estate or persons interested suffered a loss on account of the time or manner of sale or the price realized.

§ 2685, Code Civ. Pro.

New section.

This section may be used where a large business, or much personal property, or tenement or vacant property must be sold, and the representative desires to preserve some evidence of the facts and conditions and give the persons interested an opportunity to be formally heard on the advisability of selling at a particular time and for an approximate price.

¶ 226 Payment of Debts, and Their Preference.

Payment of debts.

Every executor and administrator must proceed with diligence to pay the debts of the deceased according to the following order:

1. Debts entitled to a preference under the laws of the United States and the state of New York.
2. Taxes assessed on property of the deceased previous to his death.
3. Judgments docketed, and decrees entered against the deceased according to the priority thereof respectively.
4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in the third class. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery of a debt or the obtaining a judgment thereon against the executor or administrator shall not entitle such debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. An executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate; and it shall not have preference over others of the same class. Preference may be

given by the surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death, over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate.

§ 2682, Code Civ. Pro.

Effect of revision. Part of former § 2719.

The only change in this part of section 2719 is the addition in subdivision 1 of the words "and the State of New York," in accordance with recent decisions giving the State a preference.

Authority to compromise a debt is inserted in new section 2683. ¶ 221.

Debt due state of New York.

A claim of the State for money of the State appropriated by the deceased when a public officer given preference over debts. *Matter of Niederstein*, 154 App. Div. 238, 138 N. Y. Supp. 952.

Direction in a will as to paying debts.

Priority of a debt cannot be given by devising certain real estate and charging certain debts upon such real estate. *Little Falls Nat. B. v. King*, 53 App. Div. 541, 65 N. Y. Supp. 1010.

Where certain specified debts are directed by a will to be paid, the executor may pay more than the amount specified if more is justly due. *Beecher v. Barber*, 6 Dem. 129, 20 N. Y. St. Repr. 136.

Agreement for contribution for payment of debts.

An agreement for contributing equally to the payment of debts of deceased upon a division of the estate, where the language is ambiguous will be construed in the light of surrounding circumstances and will be held to include in debts, expenses of administration. *Springsteen v. Samson*, 32 N. Y. 703.

Marshaling Assets or Securities.

To marshal assets or securities is to arrange the order of liability of or charge upon several parcels of property or several

funds to which a claimant has a right to resort for payment of his demand.

For example: A, and B. have a claim upon two funds, C. has a claim upon one of them only. A. and B. can be compelled to satisfy themselves out of the fund to which C. has not access, before resorting to the other, which constitutes the only source of payment for him. *Century Dictionary*.

The doctrine of marshaling assets applies in favor of legatees so that where a claimant has two funds to which he may resort, both real and personal assets to answer the demand, and another an interest in only one, the last claimant has a right to compel the former to take satisfaction out of the fund on which the second has no lien. *Rice v. Harbeson*, 63 N. Y. 493.

If debts are not by the will charged upon the real estate, the assets are not marshaled in favor of the general legatees so as to throw the burden of the debts upon lands which pass under a residuary devise. *Turner v. Mather*, 86 App. Div. 172, 83 N. Y. Supp. 1013; *aff'd*, 179 N. Y. 581; *Hoes v. Van Hoesen*, 1 N. Y. 120; *Nagle v. McGinnis*, 49 How. Pr. 193; *Rogers v. Rogers*, 3 Wend. 503.

¶ 277 When Taxes Are Debts; Their Preference. See ¶ 409.

Where an assessment is so far completed before the death of a person that the name of the owner cannot be changed on the books, the tax becomes a debt of the deceased. *Matter of Babcock*, 115 N. Y. 450; *aff'g*, 52 Hun, 142, 22 N. Y. St. Repr. 499.

Taxes payable by a life tenant are preferred. *Coleman v. Coleman*, 5 Redf. 524.

Taxes fixed at the time of death are debts and should be paid from personal estate. Taxes accruing on real estate after death should be paid by devisees or heirs-at-law. *Matter of Mansfield*, 10 Misc. Rep. 296, 31 N. Y. Supp. 684, 64 N. Y. St. Repr. 309.

"Taxes assessed" means assessments for taxation made prior to the decease of the taxpayer. *Matter of Babcock*, 115 N. Y. 450; *aff'g*, 52 Hun, 142.

Taxes as they are generally imposed constitute a personal obligation which must be paid by the citizen, for nonpayment of which personal process in the nature of distress or the sale of his goods may be enforced against him or his personal property.

Taxes assessed and levied before testator's death upon his real estate are debts to be paid from his personal estate. *Matter of Noyes*, 3 Dem. 369.

Assessments.

Assessments for street improvements in Albany are not debts enforceable against the personal estate. *Matter of Hun*, 144 N. Y. 472.

New York city taxes.

In relation to taxes imposed on property situated in the city of New York, and local assessments therein, the rule is different, as such taxes or assessments are made a lien upon the particular property, and are not a general or personal charge against the individual owning the same. The proceedings for their collection are entirely *in rem*, and no relief can be enforced against the owner of the same. This distinction is clearly pointed out in the case of *Krueger v. Schlinger* (19 Misc. Rep. 221, 43 N. Y. Supp. 305.). "That being the case, the executor, who was a specific devisee of this property in question, had no power to pay the taxes and assessments which were a lien upon such property during the lifetime of the deceased from out of the personal estate of said decedent, and, consequently, such payments should be disallowed." *Matter of Hewitt*, 40 Misc. Rep. 322, 81 N. Y. Supp. 1030; *Lauby v. Gill*, 42 Misc. Rep. 334, 86 N. Y. Supp. 718.

A different view was taken and the taxes allowed in *In re Hoffman* (42 Misc. Rep. 90, 85 N. Y. Supp. 1082), where it was said: "The Comptroller contends that this principle does not hold with respect to taxes upon real estate imposed under the charter of the city of New York, because said charter expressly declares such taxes to be a lien upon the land and makes no provision for their collection by distress and sale of goods, and he

cites *Krueger v. Schlinger* (19 Misc. Rep. 221) and *Matter of Hewitt* (40 id. 322). In the particulars he mentions, however, the provisions of the New York City Consolidation Act of 1882, under which the taxes were imposed in the *Babcock* case (*supra*) were substantially the same as those of the present charter. Consolidation Act of 1882, §§ 846, 853, 915, 926; Charter, as amended in 1901, §§ 918, 926, 1017, 1027. Furthermore, it would be unreasonable to suppose that by directing the sale of the land without a previous resort to personalty — a procedure not permitted under an execution, and which would ordinarily be considered harsh — the Legislature intended to curtail or impair any of the rights of the State. Neither is it to be presumed that it was the legislative intent to abrogate in this manner as to the city of New York that part of section 2719 (now § 2682), Code of Civil Procedure, which requires an executor or administrator to pay ‘taxes assessed on the property of the deceased previous to his death.’”

Taxation of Personal Property in the Hands of the Representative.

By the Tax Law (§ 8) personal property in the hands of a trustee, guardian, executor or administrator is taxable in the tax district where such representative resides, and if there be more than one the assessment and tax may be divided. It is important to ascertain that the assessment is legal before payment is made, so that credit for the payment may be allowed on the accounting.

This law as applied may be found in the following cases: *Bowe v. McNab*, 17 Misc. Rep. 414, 40 N. Y. Supp. 1112; *People ex rel. Young v. Dederich*, 40 App. Div. 570; *aff'd*, 160 N. Y. 687; *Dale, Trustee, v. City of N. Y.*, 71 App. Div. 227, 75 N. Y. Supp. 576; *People ex rel. Kellogg v. Wells*, 182 N. Y. 314; *People ex rel. McHarg v. Gaus*, 169 id. 19; *People ex rel. Moller v. O'Donnell*, 183 id. 9; *People ex rel. Andrews v. Cameron*, 140 App. Div. 76, 124 N. Y. Supp. 949; *aff'd*, 200 N. Y. 585.

Representative personally liable.

The representative is personally liable to pay a tax duly assessed on personal property in his hands as such representative, and it is no defense that he has distributed the same when suit is brought. *City of N. Y. v. Goss*, 124 App. Div. 680, 109 N. Y. Supp. 151; *City of N. Y. v. Dietz*, 66 Misc. Rep. 628, 123 N. Y. Supp. 1072.

Suit under New York city charter.

A defense that the representative is unable to pay the tax for want of property under section 934 of the New York city charter, is not available where the property has been distributed after the tax was assessed. *City of N. Y. v. Goss*, 124 App. Div. 680.

Where temporary administrator has been appointed.

Where full letters are issued the title passes to their holders although the temporary administrators have not accounted and been discharged. *People ex rel Avery v. Purdy*, 155 App. Div. 607, 140 N. Y. Supp. 614.

¶ 228 Debt by Judgment or Decree Against Deceased.

Where a final decree of a surrogate or a judgment is presented as a claim against an estate the surrogate must determine to whom the amount due under the judgment or decree is payable, the sum to be paid by reason thereof, and all other questions of a like nature which do not put in issue the validity of the judgment or decree. Code Civ. Pro., § 2743 (now § 2742). *McNulty v. Hurd*, 72 N. Y. 518; *Matter of Browne*, 35 Misc. Rep. 362, 71 N. Y. Supp. 1034.

The judgment or decree stands as a judicial settlement of the rights of the parties at its date. Transactions may have been had between the parties subsequent to the entry of the judgment or decree by reason of which the rights of the parties have been changed.

The surrogate may inquire into and pass upon payments made to apply upon such a judgment or decree and determine the

amount remaining. He may also determine who is the owner of the judgment and entitled to the money.

The statement in *McNulty v. Hurd*, that the surrogate might determine who was the owner of the judgment, undoubtedly referred to ascertaining the legal or apparent title where there was no dispute.

Otherwise that conclusion would subvert the basis of the decision by opening the door to equitable jurisdiction which it sought to close. *Matter of Randall*, 152 N. Y. 508.

The surrogate has no jurisdiction to try and decide upon an alleged claim in favor of the administrator and against the creditor by judgment or decree which claim when so established it is proposed to set off against such judgment or decree. *Matter of Underhill*, 117 N. Y. 471; *Stilwell v. Carpenter*, 59 id. 414; *Matter of Wait*, 39 Misc. Rep. 74, 78 N. Y. Supp. 869; *Mowry v. Peet*, 88 N. Y. 453.

A debt by judgment is one which has been established by a court of competent jurisdiction. *Matter of Browne*, 35 Misc. Rep. 362, 71 N. Y. Supp. 1034.

Where claim is made under a judgment against deceased one year and six months is added to the twenty years before the claim is barred. *Visscher v. Wesley*, 3 Dem. 301.

A judgment by default is not a judgment upon a trial upon the merits. *Matter of Kirkpatrick*, 1 Gibb. Sur. Rep. 71.

Judgment discharged by decree in bankruptcy.

A judgment which was provable as a claim against the bankrupt is discharged by a final decree in bankruptcy, although no proceeding has been taken in the state court under section 150 of the Debtor and Creditor Law to have the same discharged of record.

The burden of proving that it was not of a character to be affected by the decree is upon the person asserting it. *Matter of Peterson*, 64 Misc. 217; aff'd, 137 App. Div. 435.

Priority among judgments.

The preference of a judgment is not affected by the fact that the assets were acquired after the judgment was obtained. *Matter of Foster*, 8 Misc. Rep. 344, 1 Gibb. Sur. Rep. 82, 60 N. Y. St. Repr. 448; aff'd, 84 Hun, 610.

A judgment is prior to another when it was recorded earlier in point of time than another and as such it is entitled to priority of payment. *Matter of Sherwood (Townsend)*, 83 Hun, 200, 63 N. Y. St. Repr. 856, 31 N. Y. Supp. 409.

Preference of judgments.

The preference which the statute gives judgment creditors in the distribution of the estate of a deceased person is absolute, and they cannot be deprived of that preference by any inquiry into the cause of action on which the judgment was recovered. *Matter of Blackford*, 35 App. Div. 330, 54 N. Y. Supp. 972.

The judgment entered after the defendant's death in accordance with an interlocutory judgment rendered before his death is a judgment against the deceased and is entitled to priority of payment. *Matter of Clark* 5 Dem. 377, 8 N. Y. St. Repr. 745; *Matter of Dunn*, 5 Redf. 27.

Debt put into judgment against representative.

The recovery of a judgment against the administrators would not entitle the debt to preference in payment over others of the same class. It would have the effect, however, of constituting it a liquidated debt against the estate. Code Civ. Pro., § 2682; *Schmitz v. Langhaar*, 88 N. Y. 503; *Glacius v. Fogel*, id. 434; *Allen v. Bishop's Executors*, 25 Wend. 414, 415.

A judgment is not a protection to an executor or administrator who pays the same, where after rejecting the claim he made no defense thereto, but relied upon the fact that such judgment was obtained to protect him in paying the claim. *Matter of Watson*, 115 App. Div. 310, 100 N. Y. Supp. 993; aff'd, 187 N. Y. 541.

An execution issued on a judgment against an executor or ad-

ministrator does not entitle the creditor to any priority of payment. *Schmitz v. Langhaar*, 88 N. Y. 503.

Deficiency judgment on foreclosure against representative.

A judgment for deficiency on foreclosure presented as a debt is conclusive on the surrogate as a final adjudication between the parties by a competent tribunal. *Glacius v. Fogel*, 88 N. Y. 434.

Where a mortgagor who was personally liable for any deficiency arising on foreclosure of his mortgage is dead, his personal representatives may be made parties to an action of foreclosure, and they must pay the amount of the judgment for deficiency out of any property in their hands. *Glacius v. Fogel*, 88 N. Y. 434.

Judgment for deficiency on mortgage foreclosure against the representative is not a preferred claim. *James v. Beesly*, 4 Redf. 236.

Judgment rendered against a party after his death.

Where a judgment for a sum of money, or directing the payment of money, is entered against a party, after his death, in a case where it may be so taken, by special provision of law, a memorandum of the party's death must be entered, with the judgment, in the judgment-book, indorsed on the judgment-roll, and noted on the margin of the docket of the judgment. Such a judgment does not become a lien upon the real property, or chattels real, of the decedent; but it establishes a debt, to be paid in the course of administration.

§ 1210, Code Civ. Pro.

Judgment for Costs Against Representative a Preferred Debt.

A judgment for costs against an executor or administrator obtained in a case where the executor or administrator sued and was defeated should be treated as an expense of administration and is preferred to claims of general creditors on judicial settlement. *Matter of Mahoney*, 37 Misc. Rep. 472, 75 N. Y. Supp. 1056.

Where a judgment was obtained against the administrator and it included costs, it was held that the costs should be paid in full,

when there were not enough assets to pay general creditors in full. *Shields v. Sullivan*, 3 Dem. 296.

Where an estate was insolvent and the creditors received 40 per cent. on their claims, the costs in a judgment against the executor were allowed in full. *Shields v. Sullivan*, 3 Dem. 296.

¶ 229 Judgments and Other Liens, and Secured Debts.

A debt secured by a chattel mortgage which has not been renewed should not be paid in full where the estate is insolvent, but is a general debt. *Matter of Van Houten's Est.*, 18 Misc. Rep. 524, 42 N. Y. Supp. 1115.

Counsel fee in an action for separation is not a debt of the deceased husband payable from his estate. *Kellogg v. Stoddard*, 89 App. Div. 137, 84 N. Y. Supp. 1015; rev'g, 40 Misc. Rep. 92, 81 N. Y. Supp. 271.

Local assessments for street improvements in Albany are not debts of the deceased payable by the executor or administrator, but are in the nature of mortgages against the interest of the heirs or devisees. *Matter of Hun*, 144 N. Y. 472. See ¶ 227.

Bonds as debts.

Where a husband executed and delivered two bonds to his wife as a gift — *held*, that they were not enforceable after his death against his personal estate. *Matter of James*, 146 N. Y. 78; aff'g, 78 Hun, 121, 60 N. Y. St. Repr. 184, 28 N. Y. Supp. 992.

The holder of a mortgage may by writing acknowledge satisfaction thereof, the consideration of which is services rendered, and the inadequacy of the consideration will not be available to the representatives of the mortgagee after his death. *Sherman v. Matthieu*, 106 App. Div. 368, 94 N. Y. Supp. 565.

Legacy to widow in lieu of dower is a debt. See ¶ 311.

A legacy to a widow in lieu of dower when accepted by her becomes a debt of the deceased payable like other debts. *Wilmot v. Robinson*, 42 Misc. Rep. 244, 86 N. Y. Supp. 575.

Debt for support as public charge.

If there is no evidence that the deceased obtained help from the charity department of the city by any fraudulent act which has been proved to have been committed by her and which induced the city to grant her charity, then, under the decision in the case of *City of Albany v. McNamara*, 117 N. Y. 168, 173, the claimant has not established a claim against the estate and cannot recover. *Matter of Carroll*, 55 Misc. Rep. 496, 106 N. Y. Supp. 681; aff'd, 127 App. Div. 932, 111 N. Y. Supp. 1112.

¶ 230 Funds Applicable to Payment of Funeral and Burial Expenses.

The burial of a dead body being an absolute necessity it has been the constant aim of the law to see that almost no property escaped liability for such expenses.

Therefore some property which may not be considered assets generally, can be applied if necessary to the payment of funeral expenses. See ¶¶ 197, 198.

For such purpose proceeds of sale of infant's and lunatic's real estate (¶ 197), accrued pension in certain cases (¶ 459), and damages recovered for negligently killing a person (¶ 419) may be so applied.

One singular exception to this rule is that personal property to the extent sometimes of from \$300 to \$500 may be set off to the widow and minor children and cannot be taken for such expenses.

Where the deceased left \$50 in money which was set off to the widow it was held to be exempt from funeral charges. *People ex rel. Brown v. Prendergast*, 146 App. Div. 713.

Payment from principal after life estate.

Where the widow was given a life estate in the husband's property with the right to use as much of the principal as was necessary, and she died leaving no estate, her funeral expenses were

directed to be paid from the husband's estate. *Matter of Van DeWalker*, 79 Misc. Rep. 661, 141 N. Y. Supp. 325.

Where widow has life use of personal estate, funeral charges should come from principal and not income. *Zapp v. Miller*, 3 Dem. 266.

It is the general rule that where the use only of a fund is given the widow for life, the fund itself which passes to other persons upon her death, cannot be taken to pay her funeral expenses.

Therefore in drawing wills giving the wife the life use of personal estate it is always wise to direct, when it is so desired, that the expenses of her last sickness and burial be paid from the principal of the fund.

¶ 231 Payment of Funeral and Burial Expenses a Preferred Claim; Proceedings to Obtain Payment After Sixty Days.

Every executor or administrator shall pay out of the first moneys received the reasonable funeral expenses of decedent and the same shall be preferred to all debts and claims against the deceased.

Petition.

If the same be not paid within sixty days after the grant of letter testamentary or of administration the person having a claim for such funeral expenses may present to the Surrogate's Court a duly verified petition praying that the executor or administrator may be cited to show cause why he should not be required to make such payment and a citation shall be issued accordingly.

Hearing.

If, upon the return of such citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, and that the representative admits such claims, the surrogate shall make an order directing the payment within

ten days after the service of such order with notice of entry thereof upon such executor or administrator of such claim or such proportion thereof as the money in the hands of the executor or administrator applicable thereto may be sufficient to satisfy.

If the executor or administrator denies the validity of the claim or the reasonableness of its amount the surrogate must direct that such claim be heard on the judicial settlement.

If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application showing that since such dismissal the executor or administrator has received money applicable to the payment of the same.

Further application.

Such further application shall be made upon the duly verified petition stating in addition to the other necessary allegations the facts upon which the belief of the petitioner is based that there are moneys in the hands of such executor or administrator, applicable to the payment of such claim.

Upon such second or further application the granting of the citation shall be in the discretion of the surrogate and no such application shall be made less than three months after the granting or denial of any previous application.

Proceeding to compel payment of funeral expenses.

Every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the surrogate's court a petition praying that the executor or administrator may be cited to show cause why he should not be required to make such payment. If upon the return of the citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, and that the executor or administrator admits the validity of the claim or claims and the reasonableness of the amount thereof, the surrogate shall make an order directing the payment of the same, or of such part thereof as he may specify, within ten days thereafter. If the executor or administrator files an answer setting

forth the facts, and therein disputes the validity of the claim or claims, or the reasonableness of the amounts thereof, the surrogate shall direct that the claim or claims so disputed be heard upon the judicial settlement of the accounts of such executor or administrator. If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate. At any time after three months from the date of the former order, if no answer was filed disputing such claim, a further application may be made by petition stating the facts upon which the belief of the petitioner that there are moneys in the hands of such executor or administrator applicable to the payment of his claim, is based. Upon such further application the issuance of the citation shall be in the discretion of the surrogate. If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate, as above set forth, or upon such accounting, he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid.

§ 2686, Code Civ. Pro.

Effect of revision. New section.

This section was contained in former section 2719, and has been rewritten with one radical change. Under the former practice if the representative disputed the claim, a trial was then had as between the claimant and the representative, and the surrogate decided upon the validity and reasonableness of the claim. This decision was subject to objection upon judicial settlement, when the surrogate could be asked to reverse his former decision, and sometimes was forced to do it. The principle adopted in this and a few other sections where decisions were made after trials of which the persons interested had no notice, was wholly wrong. Under the present practice, if the representative disputes the funeral claim, the trial goes to the judicial settlement when all the interested parties are before the court.

There seems to be no better reason for trying the disputed claim of the undertaker, *ex parte*, than that of the doctor or merchant.

The section applied.

In this summary proceeding only the reasonable funeral expenses may be ordered paid. If a balance of the claim remains it can be submitted on the judicial settlement when the amount of the estate is determined and when all parties are before the court.

Where a brother of deceased ignored the widow and took charge of the funeral, she as administratrix was not required to pay additional expenses over necessary charges. *Matter of Moran*, 75 Misc. Rep. 90, 134 N. Y. Supp. 968.

For a very comprehensive study of this subject see opinions by Surrogate Fowler, 75 Misc. Rep. 67 to 97.

Upon a contest as to the value of funeral materials furnished, it is not competent to prove the wholesale price; the market price between the undertaker and his customer should prevail. *Kittle v. Huntley*, 67 Hun, 617, 51 N. Y. St. Repr. 223, 22 N. Y. Supp. 519.

Amendment providing for adjustment and payment of funeral expenses not retroactive; assets distributed before 1901.

The amendment to the act in question is not retroactive in regard to acts of an administrator which were lawful at the time of their taking place. It had no more effect prior to September 1, 1901, than if it had never been passed. Before that date there was no cause of action against an administrator in his representative capacity for the funeral expenses of his intestate. This was a personal and not a representative liability. *Murphy v. Naughton*, 68 Hun, 424, 52 N. Y. St. Repr. 756, 23 N. Y. Supp. 52.

Before the act of 1901 took effect the administrator had collected and disbursed the money of his intestate's estate in accordance with the existing laws. This he was legally justified in doing. It would be inequitable to force him by threat of proceedings for contempt to pay from his own funds a bill for which he is not responsible in his capacity of administrator. *Matter of Kalbfleisch*, 78 App. Div. 464, 79 N. Y. Supp. 651.

Amendment applies to prior contracted claim.

This amendment is a procedure for collection of a claim and is applicable when the claim is to be collected even if the claim accrued before the law went into effect. *Matter of Kipp*, 70 App. Div. 567, 75 N. Y. Supp. 589.

General amendments of 1914 to many sections.

What has been said above as to the amendments concerning payment of funeral expenses will apply to many other amendments made by the legislature of 1914. When such amendments are mere matter of practice, and do not adversely affect a substantial right, the practice will be in accordance with the law in force at the time the act is done.

¶ 232 Collection of Funeral Expenses by Action.

Where the representative contracted the funeral expenses he may be sued individually, but where another person contracted them he may be sued in his representative capacity. *Patterson v. Buchanan*, 40 App. Div. 493, 58 N. Y. Supp. 179.

Funeral expenses are now considered a charge upon the estate and may be collected of the executor or administrator in his representative character. *Patterson v. Patterson*, 59 N. Y. 574; *Dalrymple v. Arnold*, 21 Hun, 110; *Laird v. Arnold*, 25 id. 4, 42 id. 136, 3 N. Y. St. Repr. 376; *Koons v. Wilkin*, 2 App. Div. 13, 37 N. Y. Supp. 640, 73 N. Y. St. Repr. 234; *Shaffer v. Bacon*, 35 App. Div. 248, 54 N. Y. Supp. 796; aff'd, 161 N. Y. 635.

Action may be maintained to charge funeral expenses of wife upon real estate of husband where his will so charges. *Hallock v. Hallock*, 79 App. Div. 508, 80 N. Y. Supp. 61; *Hogan v. Kavanaugh*, 138 N. Y. 417.

A person who has agreed to support and bury a person is not always liable to a third person who performs that service, when not employed by the promisee, in an action brought against him. A person has the right to transfer his property, so that nothing

remains with which to pay funeral expenses. *Lockwood v. Smith*, 81 Misc. Rep. 334.

The representative is liable to a third person who pays for the burial, to reimburse such person. See ¶ 176.

If an executor is liable for the expenses of the burial of the deceased, from that obligation the law implies a promise to him who, in the absence or neglect of the executor, directs, not officiously, but from the necessity of the case, a burial and incurs the reasonable expense thereof. *Patterson v. Patterson*, 59 N. Y. 574. In *Rappelyea v. Russell* (1 Daly, 214), it is said that it is well settled that an executor, if he have sufficient assets, is liable upon an implied promise to a third person, who, as an act of duty or necessity, has provided for the interment of the deceased, if the funeral was conducted in a manner suitable to the testator's rank in life and the charge is fair and reasonable.

Where a mother officiously and in the presence of the husband of her deceased daughter, ignoring his rights and duties in the premises, gave directions and commands concerning the funeral, she thereby relieved the husband and the estate from the expense thereof. *Quin v. Hill*, 4 Dem. 69.

The law implies a promise on the part of the administrator having assets in his hands to reimburse the person who pays the funeral expenses. *Matter of Miller*, 4 Redf. 302; *Kessell v. Hapen*, 8 N. Y. St. Repr. 352.

A promise to pay a funeral expense if another does not is not void under the Statute of Frauds where the promisor is in possession of assets of the estate. *Griffin v. Condon*, 18 Misc. Rep. 236, 41 N. Y. Supp. 380, 75 N. Y. St. Repr. 791.

Where no special contract has been made by any person for funeral and burial, the estate of the deceased is liable by operation of law and the representative of the estate may be sued as such representative and not individually, but otherwise where the representative personally contracted the expenses. *Riley v. Waller*, 22 Misc. Rep. 63, 48 N. Y. Supp. 535.

Recovery on contract after part payment by representative.

One who makes an express contract to pay for funeral expenses is not discharged from the obligation of his contract because the estate has paid a part of the amount which he contracted to pay. The undertaker furnishing the materials cannot, of course, recover twice; but, when the estate has paid him a part of the debt incurred by another, he may recover upon the express contract for the balance of the debt. When the estate pays the undertaker what the Surrogate's Court deems the reasonable funeral expenses in view of the condition and station in life of the decedent, the right of the undertaker to sue for the balance, upon an express contract made with a third person, is not affected or impaired. *Ruggiero v. Tufani*, 54 Misc. Rep. 497; 104 N. Y. Supp. 691.

¶ 233 Reasonableness of Charges for Funeral, Headstone and Burial Lots. See ¶¶ 176, 272, 411.**Headstones and cemetery lots.**

Where a testator owned a burial lot and had erected a monument thereon, but the widow and executrix bought a lot in another cemetery and erected another monument, such expense was not allowed her. *Matter of Woodbury*, 40 Misc. Rep. 143, 81 N. Y. Supp. 503.

Estate \$26,000 — an allowance of \$200 for a tombstone approved. *Campbell v. Purdy*, 5 Redf. 434.

Forty dollars allowed for burial lot where the gross estate was about \$1,200. *Chalker v. Chalker*, 5 Redf. 480.

Three hundred and fifty dollars allowed for burial lot where the estate was about \$13,000. *Valentine v. Valentine*, 4 Redf. 265.

Payment of \$85 for headstone and \$50 for care of cemetery lot approved. *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530.

A payment of \$101 for a new burial lot not allowed where deceased owned one, but the new one was bought because the son of the deceased claimed that he would not permit the deceased

to be buried on such lot, nor his wife (the testatrix) when she died. *Matter of Caldwell*, 188 N. Y. 115, aff'g, 114 App. Div. 906.

Estate of about \$10,000 mostly in real estate. Five hundred dollars expended for monument was disallowed on the ground that a stone of that cost was not a headstone but was an erection of considerable display. *Owens v. Bloomer*, 14 Hun, 296.

Estate of \$17,000 — \$2,000 was expended for a vault and tomb and \$580 for a cemetery lot — held that the \$2,000 item should be cut to \$1,000. *Matter of Shipman*, 82 Hun, 108, 64 N. Y. St. Repr. 161, 31 N. Y. Supp. 571.

Four hundred dollars allowed for monument out of an estate of \$8,000. *Matter of Beach*, 1 Misc. Rep. 27; 22 N. Y. Supp. 1079.

Three hundred dollars allowed for monument when estate was over \$6,000, and rights of creditors were not impaired. *Matter of Howard*, 3 Misc. Rep. 170; 23 N. Y. Supp. 836.

Four hundred and three dollars allowed for tombstone out of an estate of \$10,000 to \$15,000. *Matter of Laird*, 42 Hun, 136.

Provision contained in will.

Under the will which gave the executor discretion as to amount to be expended for monument, and it appearing that the net estate was less than \$2,000, an expenditure of \$250 was authorized. *Burnett v. Noble*, 5 Redf. 69.

Estate \$2,410 — monument, etc., erected according to direction in the will costing \$1,050 — not allowed. *Matter of Smith*, 75 App. Div. 339, 78 N. Y. Supp. 130.

Estate \$11,000 — claim for monument erected pursuant to will, giving executor discretion as to amount to be expended, \$1,455 — allowed \$700. *Matter of Luckey*, 4 Redf. 95.

Removal of body.

Expenses of removal of body to a more appropriate burial place allowed. *Allen v. Allen*, 3 Dem. 524.

Funeral charges.

Payment to a social organization for parading at the funeral — not allowed. *Matter of Reynolds*, 124 N. Y. 388.

Bill of \$329.50 for funeral expenses of a person leaving only \$500 of an estate, reduced to \$150. *Matter of Primmer*, 49 Misc. Rep. 413, 99 N. Y. Supp. 830.

The items for funeral expenses included \$47 for a wake and the same was allowed against the estate. *McCue v. Garvey*, 14 Hun, 562.

An infant's estate amounted to about \$6,000. A charge for casket and box of \$490 was allowed at \$175. *Matter of Kiernan*, 38 Misc. Rep. 394, 77 N. Y. Supp. 924.

Application of proceeds of funeral benefits received from lodges, etc.

Where the administratrix as widow has received money as funeral benefits from fraternal organizations, such money should be considered as a reimbursement for funeral expenses, and they should not be allowed against the estate. *Matter of Brooks*, 5 Dem. 326, 5 N. Y. St. Repr. 381.

Where funeral benefits have been received from various lodges and societies in sums more than sufficient to pay such funeral expenses, it is improper to allow the funeral expenses from the general estate. *Leidenthal v. Correll*, 5 Redf. 267.

Payment for wake and masses as part of funeral expenses. See ¶¶ 272, 328.

A reasonable payment for masses said at the funeral of a Catholic will be allowed as part of the funeral expenses. Payment to a Protestant minister for his services and for the services of a church choir or other singers is allowed as part of the funeral expenses, and so may be allowed sums contributed for masses which are said at or about the time of funeral. This does not include, however, anniversary masses.

A General Term of the Supreme Court has given (14 Hun, 562) recognition to expenses for a wake by reversing a surrogate's decision (3 Redf. 313) putting them upon the estate of a wife instead of upon the husband. That the term "funeral"

includes many circumstances and may cover varied outlays needs little search in books at hand. Thus apparel of mourning, not requisite as raiment, but commanded by custom and respect, has been allowed (3 Dem. 524); so, too, have been music and flowers. *Matter of Ogden*, 41 Misc. Rep. 158; 83 N. Y. Supp. 977. Indeed, it is of judicial learning in this State that “‘funeral’ embraces not only the solemnization of interment but the ceremonies and accompaniments attending; * * * ceremonies prompted by affection and * * * determined by the religious faith and sentiment of the friends of the deceased * * * varying from the simple bier to the imposing catafalque, from the informal liturgical service or scriptural reading for the humble to the elaborate orisons funebres attending the obsequies of the renowned.” *McCullough v. McCready*, 52 Misc. Rep. 542; aff’d, 106 N. Y. Supp. 1135.

Contract to have masses said.

A valid contract may be made with a person to expend money then handed over for masses to be said after death. *Gilman v. McArdle*, 99 N. Y. 451, rev’g, 17 Jones & S. 463.

Mourning apparel for family.

It is the almost universal practice for members of the family of a deceased person to wear mourning, and a change of apparel is thus rendered necessary as a part of the preparation for the funeral and as a mark of proper respect for the dead. This expense should only be allowed however in behalf of those members of the family for whom the deceased was bound to provide, and should be moderate in amount. The representative should not pay over a lump sum for this purpose but there should be filed with him proper evidence of the exact amount used and for what it was expended so that he may act with a due regard for the rights of all interested parties. He is as much bound to have before him the items of such expenditures as he is of the funeral expenses proper. *Matter of Meuschke*, 61 Misc. Rep. 9, 114 N. Y. Supp. 722.

A widow was allowed \$56.09 for mourning clothes out of an estate with a surplus of several thousand for distribution. *Allen v. Allen*, 3 Dem. 524; *Matter of Wachter*, 16 Misc. Rep. 137, 1 Gibb. Sur. Rep. 552, 38 N. Y. Supp. 941.

Mourning apparel allowed at \$200. *Matter of Weaver*, 53 Misc. Rep. 244, 104 N. Y. Supp. 475.

¶ 234 The Estate of a Deceased Husband or Wife Should Pay the Funeral Expenses of the One Dying, and Not the Survivor. See ¶ 411.

Concerning the liability of the estate of the deceased wife to the husband for the funeral expenses thus paid, we must follow the authorities in this State, which hold that a husband has a right of recovery of the reasonable expenses incurred and actually paid in connection with the burial, the common-law obligation of the husband to provide for the proper sepulture of his wife being a matter which never has been disputed. The necessity of providing for the proper interment of the remains of the wife before an executor acts or may act indicates at once the duty of the husband, and indeed it was a rule of the common law that any one in whose house a person died was under the obligation to see to the proper interment of the remains of the deceased. But notwithstanding this common-law obligation, it has been held by the courts of this State that, under the law as it exists here, the husband, having paid this reasonable expense, may recover from the wife's estate; and that was distinctly ruled in *Patterson v. Patterson* (59 N. Y. 574). The liability of the estate of the wife for reimbursement to the husband is also recognized in *McCue v. Garvey* (14 Hun, 562, where, upon the settlement of the accounts of a husband as administrator of the estate of his deceased wife, he was allowed out of her estate the necessary and proper funeral expenses paid by him. In *Freeman v. Coit* (27 Hun, 450), Judge Daniels, referring to *Patterson v. Patterson* and *McCue v. Garvey*, says that in this State where such an expenditure has been made by the

husband, and the deceased wife has left a separate estate owned by her, he has been allowed to reimburse himself from such estate; and it was held in *Patterson v. Buchanan* (40 App. Div. 493) that an action thereon would lie. It is argued, however, that the decision in that case has been virtually overruled by what is said by the Court of Appeals in *O'Brien v. Jackson* (167 N. Y. 31, rev'g, 42 App. Div. 171), but what was there decided has no such effect and does not apply.

A husband is bound to bury the body of his deceased wife, but he may be allowed the funeral expenses out of her estate, if she have any. *Quin v. Hill*, 4 Dem. 69; *In re Very's Est.*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389; *Matter of Stadtmuller*, 110 App. Div. 76, 96 N. Y. Supp. 1101.

The estate of a deceased wife is liable to the husband for funeral expenses incurred by a third person who has been paid by the husband. *Pache v. Oppenheim*, 93 App. Div. 221, 87 N. Y. Supp. 704.

Husband and wife living apart.

A surviving husband is under a legal obligation to bury the corpse of his wife, being allowed to reimburse himself from the separate estate of his deceased wife if she has left any such estate. This is so when she is living apart from him. If the husband fails to perform this duty he is liable to an action to recover the reasonable value of its performance by any person who on account of his absence or neglect has properly incurred the expense of the necessary burial. *Watkins v. Brown*, 89 App. Div. 193, 85 N. Y. Supp. 820.

CHAPTER XL.

Ascertaining and Paying Debts, Continued; Proceeding to Compel Payment of Debt Before Accounting; Rights, Powers and Duties of Administrators with the Will Annexed, and of Temporary Administrators.

- ¶ 235. Payment for services of wife as between husband and wife. Husband and wife, whether claim is against the estate, or the survivor.
- ¶ 236. Claims for services rendered under agreement to give compensation by will.
Joint debts.
- ¶ 237. Interest on debts and unliquidated claims.
- ¶ 238. Debts charged upon real estate.
- ¶ 239. § 2687. Proceeding to compel payment of debt before accounting.
- ¶ 240. Answer, hearing and decree.
- ¶ 241. § 2695. Rights and duties of administrators with the will annexed.
- ¶ 242. § 2597. General powers of temporary administrator.
- ¶ 243. § 2598. Temporary administrator may advertise for claims.
§ 2599. Temporary administrator may pay debts.
§ 2600. Duty of temporary administrator as to real property.
§ 2601. Duty of temporary administrator of an absentee.

¶ 235 Husband and Wife; Debts and Claims Affected By the Marital Relation.

When the husband should be paid for the services of his wife as nurse or attendant.

When the circumstances attendant upon performing the services are such that the wife is aiding or assisting her husband in performing some duty that he owes or has contracted to perform, her services will belong to him.

There is no doubt that notwithstanding the enabling statutes conferring valuable personal and property rights upon married women, they have no effect upon those duties which a wife owes to the husband at common law in the marriage relation.

Services rendered by the wife to a boarder in her husband's house belong to the husband. *Reynolds v. Robinson*, 64 N. Y. 589; *Porter v. Dunn*, 131 id. 314-320.

Reynolds v. Robinson (64 N. Y. 589) shows this state of facts: Plaintiff's wife rendered the services in his house to a boarder therein. She was engaged in no business or service on her own account. She was in charge of his household and as part of her duties rendered the services to a person in her husband's house, by contract with him. She was then working for her husband, and not for herself, or on her own separate account.

Porter v. Dunn (131 N. Y. 314, 320) is a case where the plaintiff's wife, while attending to the household duties and helping her husband in his business, and being engaged in no occupation separate from that devolving upon her as wife, also attended upon the deceased, who was a boarder in plaintiff's house, and cared for him as a nurse. This court held that under the circumstances the right of the husband to maintain the action for such services was clear.

When married woman should be paid for her services as nurse or attendant.

A married woman is entitled to recover in her own name for services rendered the deceased when those services are distinct from those duties which she owes her husband in the marital relation. This principle is confirmed by the recent statute, § 60, Domestic Relations Law.

It was held in *Coleman v. Burr* (93 N. Y. 17, 30), that the act of 1860 (chap. 90, Laws of 1860) authorizing a married woman to carry on business and to perform labor on her sole and separate account did not absolve her from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station of life. Whatever services are thus rendered are not "on her sole and separate account," and in rendering them she still bears to him the common-law relation. Judge Earl says, at bottom of page 30: "A married woman owes no duty to her husband to go out of his

house and render service for persons not members of his family, and she owes him no duty to carry on any business in his house, or elsewhere, for the purpose of earning money for him, and the purpose of the statute is fully accomplished if she be permitted to retain as her own money or property obtained by her in such business or by the rendition of such services."

The principle here laid down is that the wife was under no obligation, so far as her husband was concerned, to enter into any contract, express or implied, to serve a person outside of his house and to whom he was under no obligation; she having done so, the statute permits her to collect and retain her earnings in such employment. *Stevens v. Cunningham*, 181 N. Y. 454, rev'g, 75 App. Div. 125.

Agreement between husband and wife as to her wages; husband may be liable for debts of deceased wife.

A husband may agree that his wife's earnings may belong to her, even though she created such earnings by services rendered in his own house. *Lashaw v. Croissant*, 88 Hun, 206, 68 N. Y. St. Repr. 395, 34 N. Y. Supp. 667; *Matter of Dailey*, 43 Misc. Rep. 552, 89 N. Y. Supp. 538; *Carver v. Wagner*, 51 App. Div. 47, 64 N. Y. Supp. 747; *Stokes v. Pease*, 79 Hun, 304, 60 N. Y. St. Repr. 863, 29 N. Y. Supp. 430; *Sands v. Sparling*, 82 Hun, 401, 63 N. Y. St. Repr. 558, 31 N. Y. Supp. 251.

A husband who makes an agreement with his wife that she may have her earnings in boarding and caring for a person in his house is not precluded from testifying in her behalf to transaction with the decedent. *Lashaw v. Croissant*, 88 Hun, 206, 68 N. Y. St. Repr. 395; *Sands v. Sparling*, 82 Hun, 401, 63 N. Y. St. Repr. 558, 31 N. Y. Supp. 251.

The claim may be the debt of the deceased husband or wife, as against the survivor.

Ogden v. Prentice (33 Barb. 160) — *held*, the husband liable for bonnets for the reason that he knew his wife had them and saw her wear them without expressing any disapprobation. The

law is that "the husband will be liable when the goods purchased by his wife (to the payment for which he would not be liable) come to her or his use with his knowledge and permission or when he allows her to retain and enjoy them."

Graham v. Schleimer, 28 Misc. Rep. 535, 93 N. Y. St. Repr. 689, 59 N. Y. Supp. 689. Suit by dressmaker for sewing and materials in making silk dress. Husband supplied the house and gave his wife an allowance — *held* liable — that husband ratified purchase by seeing his wife wear articles and retain them.

Cromwell v. Benjamin, 41 Barb. 558. Husband liable for necessities by implied agency when furnished against his orders.

Also child or adult members of family are in same situation. *Le Boutellier v. Fiske*, 47 Hun, 323, 13 N. Y. St. Repr. 439.

The use by a wife of her own money for the purchase of necessities for herself does not create a liability against her husband for the amount so expended, in the absence of circumstances out of which might arise a promise to pay. *Nostrand v. Ditmis*, 127 N. Y. 355.

Contract by wife.

Byrnes v. Rayner, 84 Hun, 199, 65 N. Y. St. Repr. 742, 32 N. Y. Supp. 542 (General Term, 3d Dept. 1895). Contract for board for self, husband, and horse made by wife in her own name and credit given her, she paying part of bill, balance cannot be collected from husband.

Matter of Smith, 75 N. Y. St. Repr. 1440 (Sur. Ct. 1896). Doctor's bill allowed against wife's estate as she contracted and promised to pay it.

Tiemeyer v. Turnquist, 85 N. Y. 516. A wife who buys, even for support of family, must pay if she contracts and agrees to pay.

Travis v. Lee, 34 N. Y. St. Repr. 233, 11 N. Y. Supp. 841 (General Term, 3d Dept. 1890). Action for board against wife. She did not make contract, but said of a balance due that it ought to be paid and she would see that it was. It was paid. They continued to board and wife was sued — *held* not her contract.

Crane v. Boudovine, 55 N. Y. 256. Action by physician against father of adult married daughter sick at his house.

Were she a daughter for whom by reason of minority and dependence upon him, the father was under a natural obligation to provide necessaries, etc., and were he availing himself of services rendered for his benefit or for that of anyone for whom he was bound to furnish them — there might be a recovery.

Manning v. Wells, 66 N. Y. St. Repr. 109; aff'g, 61 N. Y. St. Repr. 59. Parent under obligation to support child. Knowledge that necessaries are being furnished implies assent and promise to pay.

Maxon v. Scott, 55 N. Y. 247. The law will not imply promise by the husband to pay for the board when it was shown that it was furnished at the request of and upon the credit of his wife.

A bill for medicine furnished a wife is a charge against her husband, and not a debt against her estate. *Matter of Very*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389; *Matter of Stadtmuller*, 110 App. Div. 76, 96 N. Y. Supp. 1101.

Husband and wife living apart.

Where a husband and wife are living apart, a party furnishing goods to the wife can only recover upon proof that they were necessaries and that the husband had failed to furnish proper support. *Cromwell v. Benjamin*, 41 Barb. 558; *Baker v. Barney*, 8 Johns. 72; *Le Boutillier v. Fiske*, 47 Hun, 323, 13 N. Y. St. Repr. 439.

Presumption of law that husband is liable for all articles furnished for support of family and that wife acts as agent, unless she makes contract on her own account. *Strong v. Moul*, 51 Hun, 644, 22 N. Y. St. Repr. 762, 4 N. Y. Supp. 299.

It is a defense to show that the husband had made and paid to his wife a reasonable allowance for her support, or had amply supplied her with articles of the same character as were furnished. *Wanamaker v. Weaver*, 176 N. Y. 75; *Oatman v. Watrous*, 120 App. Div. 66, 105 N. Y. Supp. 174.

A wife who has been deserted by her husband may maintain an action against him for the support she has furnished herself and her infant children. *De Brauwere v. De B.*, 203 N. Y. 460.

It would seem, therefore, that upon his death she would have a valid claim against his estate for the money so advanced and paid.

To what extent a husband who does not take letters of administration on the estate of his wife is liable for her debts.

If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband.

§ 103, Decedent Estate Law.

A husband who acquires property of his wife by ante-nuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

§ 54, Domestic Relations Law.

¶ 236 Claims for Services Rendered Under Agreement to Give Compensation by Will, May be Allowed as a Debt.

Contracts claimed to have been entered into with persons to be enforced after their death, to the detriment of those who would otherwise be entitled to their estates, have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them and in enforcing them, when established, by specific performance. Such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is dead when the question arises. They are the natural resort of unscrupulous persons who wish to despoil estates of decedents; they threaten security of estates and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of a witness who speaks

under the strongest bias and greatest temptation. Such contracts should be in writing and the writing should be produced, or if ever based upon parol evidence it should be given or corroborated in all particulars by disinterested witnesses. *Hamlin v. Stevens*, 177 N. Y. 39; aff'g, 78 App. Div. 629; *Shakespeare v. Markham*, 72 N. Y. 400; *Winne v. Winne*, 166 id. 263; aff'g, 48 App. Div. 638, 63 N. Y. Supp. 1118; *Healy v. Healy*, 166 N. Y. 624; aff'g, 55 App. Div. 315, 66 N. Y. Supp. 927; which aff'd, 31 Misc. Rep. 636, 66 N. Y. Supp. 82; *Roberge v. Bonner*, 94 App. Div. 342, 88 N. Y. Supp. 91; *Rosseau v. Rouss*, 180 N. Y. 116; *Idé v. Brown*, 178 id. 26; *Edson v. Parsons*, 155 id. 555; aff'g, 85 Hun, 263; *Apollonio v. Langley*, 106 App. Div. 41.

Claims of this character were formerly looked upon with disfavor, and the rule as above laid down, namely, that they must be clearly established by proof and must be equitable before a court of equity would enforce them, was rigidly adhered to, but it would seem that through an enlargement of precedents or a tendency to rely upon parol testimony the rule had been relaxed. The culmination, however, seems to have been reached in *Winne v. Winne* (166 N. Y. 263), in which a finding of fact based partially upon the idea that there were no children to be disinherited and no will to indicate what disposition the deceased intended was invoked to sustain a contract of this kind. But this case in the light of the later adjudications in *Mahaney v. Carr* (175 N. Y. 454) and *Hamlin v. Stevens*, above quoted from, can no longer be considered an authority. And the Court of Appeals in the *Winne* case limits its decision to the particular case, being bound by the finding of fact. *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140.

The mere fact that equity would justify a contract will not satisfy the necessity of proving that such contract in fact was made. *Holt v. Tuite*, 188 N. Y. 17; rev'g, 110 App. Div. 915.

A frequent cause of litigation arises out of a claim that the deceased person secured the society and services of another under a promise to make compensation therefor by will. Where such an

agreement is not performed the survivor in a proper case has a claim against the estate of such person for the fair value of the services so rendered. These claims, however, are naturally viewed with some suspicion and should be proved by clear and convincing evidence.

Where services are rendered in pursuance of a mutual understanding that payment shall be made by bequest or devise, and the party dies without making the expected compensation, the one rendering the services stands as a creditor of the estate for their value. *Lane v. Calby*, 95 App. Div. 11, 88 N. Y. Supp. 465; *Robinson v. Raynor*, 28 N. Y. 494; *Collier v. Rutledge*, 136 id. 621; *Ritchie v. Bennett*, 35 App. Div. 68, 54 N. Y. Supp. 379.

Mutual understanding between father and son that services rendered should be paid for by devise of farm — on failure to so devise the farm, son was allowed compensation out of the estate as a creditor. *Robinson v. Raynor*, 28 N. Y. 494.

Where an agreement to pay for services by a legacy in a will is proved and such legacy is not sufficient to pay for such services, the claimant may maintain an action against the representative of the testator for the balance. *Reynolds v. Robinson*, 64 N. Y. 589.

Claims against estates, resting on oral evidence, are under suspicion from the outset, and all the more so when they are old and stale. They have to be proved by clear and convincing evidence of disinterested and unbiased witnesses before they can be allowed. If the evidence does not come up to this standard the case is not one for a jury. *Butcher v. Geissenhainer*, 125 App. Div. 272, 109 N. Y. Supp. 159; *Dueser v. Meyer*, 129 App. Div. 598, 114 N. Y. Supp. 64.

Contract by guardian.

The guardian contracted that infant should live with L. as long as L. lived and in consideration thereof L. was to compensate her by will — *held*, that the guardian had no power by contract or otherwise, either before or after her arriving at majority to bind

her thereafter in the disposition of her time, services, or property. *Ide v. Brown*, 178 N. Y. 26.

Consideration for promise.

In *Murphy v. Murphy* (118 App. Div. 61), 102 N. Y. Supp. 1117, the court said: "Moreover, the evidence of this witness, even if it were not inconsistent with the other testimony offered in her behalf, would not warrant a recovery, and the court was justified in declining to submit it to the jury. It does not show that the services to which reference was made were past or future services. If past services, the promise would be without consideration beyond the value of the services actually rendered. If it related to services to be rendered in the future, it is altogether too indefinite to afford a basis for a cause of action. Sufficient facts are not shown to enable the court and jury to determine whether or not the plaintiff accepted the promise and rendered the services in reliance thereon, or whether or not the services contemplated to be rendered were in fact fully rendered in accordance with the intention of the parties."

All of the elements of a contract must be proved.

Proof of a parol agreement that the decedent promised to leave all his property to the plaintiff must furnish all the essentials of a contract; must show that the agreement is fair and equitable, and the terms thereof definite and certain, and the agreement must be clearly established by the testimony of disinterested witnesses. *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Hamlin v. Stevens*, 177 N. Y. 39; *Gall v. Gall*, 64 Hun, 600; aff'd, 138 N. Y. 675; aff'g, 19 N. Y. Supp. 332.

An alleged contract between the father of a child and her grandfather for rights in his estate after his death rejected. *Mahaney v. Carr*, 175 N. Y. 454.

Where an aunt and the father of plaintiff testified to an oral contract after eighteen years, it was held not sufficient evidence to enable the plaintiff to recover. *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864.

Contract for adoption and provision.

A contract of adoption specified what the person adopting should do, and the oral contract to do better for the child was rejected. *Brantingham v. Huff*, 174 N. Y. 53; rev'g, 67 App. Div. 621, 73 N. Y. Supp. 643.

A written agreement to adopt a child and provide for her as a daughter, enforced. *Middleworth v. Ordway*, 191 N. Y. 404.

Evidence of intention to make claimant a beneficiary in a will or other instrument.

Where the claim is based upon a verbal contract, evidence, not part of the *res gestæ*, tending to prove that the deceased had said he intended to make claimant a beneficiary in his will or insurance policy is not competent when offered to show that deceased expected to compensate claimant. *Scheu v. Blum*, 119 App. Div. 825, 104 N. Y. Supp. 887.

Declarations of a testamentary intention do not constitute any element of a contract unless it is shown that they were communicated to the claimant, were made for the purpose of inducing the claimant to render the services, and that such services were performed in consequence of such promise or declarations. *Matter of Stewart*, 21 Misc. Rep. 412, 47 N. Y. Supp. 1065.

Statute of limitations.

The statute does not begin to run until the death of deceased, where the claim is that the services were to be paid for by a provision in the will. *Taylor v. Welsh*, 92 Hun, 272, 72 N. Y. St. Repr. 316, 36 N. Y. Supp. 952; *Quackenbush v. Ehle*, 5 Barb. 469; *Leahy v. Campbell*, 70 App. Div. 127, 75 N. Y. Supp. 72; *Blair v. Hager*, 97 App. Div. 358; *Chambers v. Boyd*, 116 App. Div. 208, 101 N. Y. Supp. 486.

Where there is an agreement to pay by will for certain services, and subsequently the promisor abandons the contract, the Statute of Limitations does not begin to run until the death of the promisor. *Matter of Funk*, 49 Misc. Rep. 199, 98 N. Y. Supp. 934.

Claim in nature of a specific legacy for care and nursing during life; statute not a defense. *GaNun v. Palmer*, 202 N. Y. 483.

Joint Debts.

Since the amendment to section 785, Code Civ. Pro., made in 1877, the estate of a joint debtor is liable at law and the creditor is no longer confined to his equitable action, but still the method of procedure has not been changed, and the complaint should allege that the plaintiff has been unable to make collection from the survivor or survivors. *Potts v. Dounce*, 173 N. Y. 335; aff'g, 67 App. Div. 434; *Hentz v. Havemeyer*, 132 App. Div. 56, 116 N. Y. Supp. 317.

The estate of a person jointly liable upon contract with others shall not be discharged by his death. Code Civ. Pro., § 758. See also *Randall v. Sackett*, 77 N. Y. 480.

Decisions no longer applicable. 49 N. Y. 385, 63 id. 245, 67 id. 160, 432.

A contribution between surviving surety and estate of deceased surety can be enforced. *Johnson v. Harvey*, 84 N. Y. 363.

Where a grantee assumes a mortgage and pays it, he cannot recover against the estate of the mortgagor as a joint obligor. *Matter of Browne*, 35 Misc. Rep. 362, 71 N. Y. Supp. 1034.

Claim where wife has deposited her money with her husband.

Money of the wife may be deposited with her husband upon an agreement that he will manage, control, and invest the money and account for it with all accumulations upon request. This is in effect a trust of indefinite duration. *Sheldon v. Sheldon*, 133 N. Y. 1.

Where a wife deposits money with her husband to be held by him until called for and he dies still holding the money, no interest accrues before his death. *Boughton v. Flint*, 74 N. Y. 476; rev'g, 13 Hun, 206.

When statute of limitations begins.

If money is received in such a way that the law imposes an obligation to pay it over at once, then the statute will begin to

run from the time it is received. *Mills v. Mills*, 115 N. Y. 80; rev'g, 23 N. Y. St. Repr. 604; *Sheldon v. Sheldon*, 133 N. Y. 1; *Wood v. Young*, 141 id. 211.

Husband had collected amounts due on bond and mortgage to his wife and had not paid them over at his death, she having requested him to keep the money for her — *held*, a deposit and that the Statute of Limitations did not begin to run until a demand was made. *Boughton v. Flint*, 74 N. Y. 476; rev'g, 13 Hun, 206.

Husband was handling wife's money under agreement to have what he could make by its use — *held*, Statute of Limitations did not run until demand, and claimant allowed to recover against husband's estate. *Matter of Wiltsie*, 12 N. Y. St. Repr. 144.

The Statute of Limitations will not run against the deposit by a wife with her husband until a demand for its return has been made. *Dorman v. Gannon*, 4 App. Div. 458, 74 N. Y. St. Repr. 152, 38 N. Y. Supp. 659; *Boughton v. Flint*, 74 N. Y. 476; rev'g, 13 Hun, 206.

Deposits in joint names of husband and wife. See ¶¶ 198, 427.

While joint tenancy is not favored either in law or equity, yet on account of the peculiar relations of husband and wife a deposit by either in the names of both will be held to create a joint tenancy in the fund, and the survivor will take the fund.

Deposit by husband in name of his wife or himself or the survivor of them entitles either or the survivor to claim the fund, even though the pass-book always remains in the possession of the husband. *McElroy v. Alb. Sav. Bank*, 8 App. Div. 46, 74 N. Y. St. Repr. 862; *In re Meehan*, 59 App. Div. 156, 103 N. Y. St. Repr. 9, 69 N. Y. Supp. 9.

¶ 237 Interest on Debts and Unliquidated Claims.

In actual practice the question of allowing interest on debts and unliquidated claims does not seriously arise. This matter is usually adjusted by the representative and the claimant with far

less difficulty than the courts have experienced in settling the question.

Interest from date of maturity.

Upon notes and other like forms of debts due at a given date, interest is allowed from the date of maturity under the general rule. *Leask v. Hoagland*, 64 Misc. Rep. 156, 118 N. Y. Supp. 1035, 136 App. Div. 658, 121 N. Y. Supp. 197.

Likewise debts for services rendered and goods sold, etc., where the debtor is in default for non-payment pursuant to his contract will draw interest from the due date or from the date of demanding payment or rendering a bill in accordance with the custom of the trade. *Mansfield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331-349.

Unliquidated claims.

In that class of cases where the amount of the claim cannot be known or ascertained and computed, actually or approximately, by reference to market values, but the allowance or disallowance of the claim requires special investigation into the facts and circumstances by the representative, the rule has been made of allowing interest from the date of presentation of the claim to the representative. *De Carricarti v. Blanco*, 121 N. Y. 230; *Matter of Tyndall v. Van Auken*, 106 App. Div. 238, 94 N. Y. Supp. 269; *Jackson v. Byrne*, 130 App. Div. 364, 114 N. Y. Supp. 888.

In another class of unliquidated claims where there were alleged payments, offsets and counterclaims, or services were rendered upon a *quantum meruit* no interest has been allowed. *Holmes v. Rankin*, 17 Barb. 454; *DeWitt v. DeWitt*, 46 Hun, 258, 11 N. Y. St. Repr. 549; *Mansfield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331-349; *Sayre v. State*, 123 N. Y. 291-297; *Littell v. Ellison*, 44 N. Y. St. Repr. 22, 17 N. Y. Supp. 294; *Spencer v. Hall*, 30 Misc. Rep. 75, 62 N. Y. Supp. 826; *aff'd*, 51 App. Div. 623; *Benedict v. Sliter*, 31 N. Y. Supp. 413, 64 N. Y. St. Repr. 1; *Smith v. Velie*, 60 N. Y. 106; *Matter of Hartman*,

13 Misc. Rep. 486, 70 N. Y. St. Repr. 193, 35 N. Y. Supp. 495; *Matter of Totten*, 137 App. Div. 273, 121 N. Y. Supp. 942.

¶ 238 Debts Charged upon Real Estate. See ¶ 247.

Debts and legacies, as to being charged upon real estate, stand upon a different basis, and consequently words that would indicate an intention to charge one upon the real estate might not convey any such intention as to the other. As, for instance, the giving of a power of sale to pay legacies would indicate an intention that the legacies be paid out of the real estate. But it does not follow that a power of sale to pay debts indicates an intention to charge the debts upon the real estate, for the real estate being liable after the personal property is exhausted, the power of sale may have been incorporated in the will for the purpose of avoiding long and expensive proceedings in the Surrogate's Court to sell the real estate for the payment of debts. *Clift v. Moses*, 116 N. Y. 144; aff'g, 44 Hun, 312.

Where power to sell certain real estate to pay debts is given, but there is sufficient personal with which to pay debts, the personal estate is not exonerated, but must pay the debts and the land descend to the heirs. *Sweeney v. Warren*, 127 N. Y. 426; rev'g, 52 Hun, 246.

The formal words "after all my debts," etc., are no evidence of intent to charge debts on real estate, neither is inadequacy of real estate alone. *Matter of Rochester*, 110 N. Y. 159; rev'g, 46 Hun, 651.

Power of sale general in character.

Executors paid debts in excess of personal estate. They were allowed to repay themselves from the proceeds of the real estate. *Matter of Bolton*, 146 N. Y. 257; aff'g, 83 Hun, 259; *Matter of Powers*, 124 N. Y. 361; *Matter of Gantert*, 136 id. 106; aff'g, 63 Hun, 280; *Cahill v. Russell*, 140 N. Y. 402.

The fact that land is charged with the payment of debts does not confer upon the executor power to sell the land for such purpose. *Matter of Fox*, 52 N. Y. 530.

Inadequacy of personalty is not suggestive of an intent to charge the realty with the payment of debts in view of the provisions of the Code for selling real estate to pay debts. *Matter of City of Rochester*, 110 N. Y. 159; rev'g, 46 Hun, 651.

Where general debts are charged upon real estate devised, the devisee does not become liable to pay such debts. *Clift v. Moses*, 116 N. Y. 144; aff'g, 44 Hun, 312, distinguishing *Brown v. Knapp*, 79 N. Y. 136.

Right to rents.

There is now a provision (§ 2701 ¶ 245) by which the representative may obtain an order permitting him to collect the rents pending a sale. If such an order is not obtained, the rents go to the heir or devisee as held in the following decisions.

The heir or devisee is entitled to the rents and profits arising until the land is actually sold. *Clift v. Moses*, 116 N. Y. 144; aff'g, 44 Hun, 312; *Wilson v. Wilson*, 13 Barb. 252.

Where general debts are charged on real estate they become a lien thereon, but the devisee is entitled to the rents and profits until sale, unless the estate is insolvent and a receiver is appointed. *Clift v. Moses*, 116 N. Y. 144; aff'g, 44 Hun, 312.

Land Devised Charged with Debt. See ¶¶ 247, 306.

Land devised to son charged with payment of debt due from son to testator. Son refused to accept the devise — *held*, that the debts were charged on all the land descending and not on the share that descended to the heirs of the son. *Young v. Young*, 102 App. Div. 444; aff'd, 183 N. Y. 550.

Where in event of marriage of wife there was a devise over, the legatee to pay all debts outstanding against testator at time of decease or remarriage of wife — *held*, that such debts should be paid out of the residuary estate. *Brown v. Brown*, 41 N. Y. 507.

Executor may sell to pay his own debt.

An executor who has power of sale to pay debts may exercise that power for the payment of his own debt where the same has

been proved and allowed upon the first accounting. The Statute of Limitations as to such debt is suspended from the death of deceased to the date of such first proceeding. *O'Flynn v. Powers*, 136 N. Y. 412; aff'g, 49 N. Y. St. Repr. 325, 21 N. Y. Supp. 905.

¶ 239 Proceeding to Compel Payment of a Debt Before Accounting.

Former section 2722 providing for a proceeding to compel payment of a debt, has been repealed, since the same relief can now be had by an application for an accounting when advertisement for creditors has been had. Where advertisement for creditors has not been begun within three months from grant of letters, section 2687 provides for an application for payment of a debt, on which the representative must either reject the claim, in which case it goes to judicial settlement for trial, or he must show good cause why the condition of the estate does not justify its present payment.

The surrogate hears the proofs and allegations of the parties and makes such a decree as justice requires. See also ¶ 302.

Is not a proceeding for an accounting.

The petition should not pray that the executor be required to account, neither should the citation require him to so account. Where an accounting is deemed advisable by the surrogate he may order it under section 2721, Code Civ. Pro. *Baylis v. Swartwout*, 4 Redf. 395.

Proceeding to compel payment of debt, legacy or distributive share, or delivery of property.

Where the executor or administrator has not begun the publication of the notice to creditors to present their claims, and three months have elapsed since the probate of the will or grant of letters of administration, any creditor of the deceased having a claim which has not been rejected, or any person entitled to a specific bequest, or to a legacy or other pecuniary provision under a will, or to a distributive share of an estate, may present to the surrogate's court a petition setting forth the facts and praying that the executor or

administrator be cited to show cause why he should not pay said claim or pay or satisfy such bequest, legacy or distributive share.

Upon the return of such citation the executor or administrator may reject such claim, or show good and sufficient cause why he should not pay such claim, or pay or satisfy such bequest, legacy or distributive share in whole or in part. The surrogate may dismiss such petition, or direct immediate payment or satisfaction thereof in whole or in part, or upon receiving a bond as provided in section 2688 of this chapter.

§ 2687, Code Civ. Pro.

Scope of section.

“The object of this section is to provide a way whereby creditors and others having claims against the estate of a decedent, or entitled to share therein, may obtain payment thereof, in whole or in part, in advance of the final accounting and distribution, in cases where such contemplated payment may be made consistently with the rights of all parties interested in the estate.

“When application is made by a creditor for the payment of his debt under this section, the surrogate, before making a decree therefor, must necessarily inquire as to the condition of the estate, the amount of the assets, and of the debts. If it appears from the proofs presented, that the relief asked may be granted without prejudice to other creditors, the surrogate may make the decree, and the executor or administrator acting in good faith will be protected in paying the debt in full, pursuant to the decree, although it may finally turn out that by reason of losses, depreciation of values, or other causes, the remaining assets are insufficient to fully pay the other creditors. It is quite possible that this result may happen, and it often will happen, unless great care is taken by the surrogate in exercising this jurisdiction. The application may be made before the executor or administrator has been able to ascertain, by advertisement, the amount of debts owing by the decedent, and many contingencies may happen to impair the value of the estate between the decree and the final accounting and distribution.” *Matter of Miner*, 39 Misc. Rep. 605, 80 N. Y. Supp. 643.

The hearing being had without the presence of all interested parties, is not intended to be one which will decide any ques-

tions which are in reality subjects of fair dispute. When such questions exist and arise in good faith, their determination will be held until the judicial settlement.

The surrogate should not dismiss the proceeding upon the filing of an answer which raises an issue, but he should proceed with the hearing until he can safely make an order for trial on judicial settlement, or for the immediate payment of the claim in whole or in part. This is one of the instances where the revisers have sought to correct the former practice of passing upon a disputed question of fact which may later be the subject of further consideration when all the parties interested are before the court.

Not a proceeding for enforcement of judgment and decree.

Where a claim has been allowed by a decree, or a distributive share fixed and ordered paid, the claimant must proceed under the decree and not under this section. *Matter of Maran*, 59 Misc. Rep. 133, 112 N. Y. Supp. 207.

If it is set up in the account on judicial settlement that a claim has been paid, the creditor cannot proceed under this section upon an allegation that the claim was not paid. *Matter of Murphy*, 59 Misc. Rep. 131, 112 N. Y. Supp. 220; aff'd, 127 App. Div. 929, 111 N. Y. Supp. 1131.

May determine whether claim has been admitted.

The surrogate may decide and determine in the proceeding whether or not the claim has in fact been rejected or allowed, and if allowed he may direct its payment, even though the usual answer is filed. *Matter of Miles*, 170 N. Y. 75; rev'g, 61 App. Div. 562, 71 N. Y. Supp. 71; which rev'd, 33 Misc. Rep. 147.

Who is a creditor.

A party holding a judgment against an administratrix recovered upon a claim which did not exist at the time of decedent's death is not a "creditor" of the estate within the meaning of section 2722 (now section 2687), Code Civ. Pro. *Matter of Mahoney*, 37 Misc. Rep. 472, 75 N. Y. Supp. 1056.

Costs recovered against an administrator do not constitute a debt so that the person entitled to them is a creditor who can maintain the proceeding. *Hall v. Dusenbury*, 38 Hun, 125.

The claim must be one contracted by the deceased in his lifetime, and not one for the education of a minor pursuant to directions in the will. *Bulkley v. Staats*, 4 Redf. 524.

Claim for services rendered an executor in probating will, etc., is against the executor and not the estate and cannot be made the basis of an application under this section. *Budlong v. Clemens*, 3 Dem. 145.

When proceeding may not be maintained against an administrator cum testamento annexo.

A creditor of a son of deceased made application to have his claim paid from the distributive share which would go to the son under the laws of France where the testator resided. An answer was filed alleging facts tending to show that the validity or legality of the claim that the son had an interest in the estate was doubtful — *held*, that the surrogate properly dismissed the proceedings. *Matter of Dunn*, 39 App. Div. 510, 57 N. Y. Supp. 444.

¶ 240 *Idem*; the Answer, Hearing and Decree.

The answer.

Cases decided under former section 2722.

The court is not deprived of jurisdiction by the filing of an answer, but the allegations of the answer will be considered by the court to determine whether there are in reality any fair questions at issue, and if so found the proceedings will be dismissed to await their determination on judicial settlement when all interested parties are present.

An answer that the claim is disputed or has been rejected is not sufficient to require the dismissal of the proceedings. The facts upon which such rejection was based must be set forth, so that the surrogate can determine whether it is or is not doubt-

ful whether the petitioner's claim is valid and legal. While the surrogate cannot try the claim, he can try the good faith of the representative who seeks to avoid payment of a debt arbitrarily and without reasonable cause.

The surrogate should refuse to dismiss the proceeding upon an answer in which there is an entire absence of statement of any fact tending to show that the representative has any reasonable defense to the claim of the petitioners. *Matter of De Forest*, 119 App. Div. 782, 104 N. Y. Supp. 342; aff'd, 189 N. Y. 544.

An allegation by answer that the deceased was discharged in bankruptcy authorizes the dismissal of a proceeding brought by a judgment creditor. *Matter of Peterson*, 62 Misc. Rep. 161, 116 N. Y. Supp. 286.

When the surviving executor and the executor of a deceased executor are respondents, the latter cannot by answer deny the validity of the claim and thus cause the proceeding to be dismissed. *Matter of Wood*, 70 Misc. Rep. 467, 128 N. Y. Supp. 1102.

An answer which alleges lack of assets does not require dismissal of the proceedings. There must be proof of that fact. *Brown v. Phelps*, 48 Hun, 219; aff'd, 113 N. Y. 658.

Defense of statute of limitations.

There is a broad distinction between the establishment of a right to participate at all, as a creditor, in an estate, and the right to maintain a proceeding for an accounting by the administrator at the instance of one whose rights as a creditor are established. To an attempt at the establishment of the status of creditor it is the duty of the representative to interpose every defense legally available, including the statute of limitations. *Matter of Van Voorhees*, 55 Misc. Rep. 185, 106 N. Y. Supp. 354.

All the proceedings in the Surrogate's Court are regarded as special proceedings within the meaning of the Code of Civil Procedure, and the rule of limitation prescribed by section 382,

Code Civ. Pro., is by force of the provision of section 414, Code Civ. Pro., made applicable to such proceedings. *Matter of Elkins*, 74 N. Y. St. Repr. 299.

Application by next of kin to have administrator account and make distribution about nineteen years after his appointment. Although it was claimed that by certain acts the administrator had recognized his liability to the next of kin within six years before the making of the petition, it was not shown that he had so recognized his liability to the petitioner, and the defense of the statute was allowed. *Matter of Elkins*, 74 N. Y. St. Repr. 299.

Proof of assets.

The petitioner has the burden of showing that there is money or other personal property of the estate which may be applied to the payment of the debt or claim. *Lynch v. Patchen*, 3 Dem. 58.

The surrogate should require proof that there are assets sufficient to warrant the order asked for, and to that end he may consider the inventory and other papers on file in his office.

The surrogate holds a peculiar position with reference to estates administered through his office, and in a sense every step before him in the administration of an estate may be considered as one move in the one general proceeding for the administration of the estate; so that, when the surrogate is called upon to act in the administration of an estate, the records of his office under his immediate charge are before him and cannot be entirely disregarded. *Matter of De Forrest's Will*, 104 N. Y. Supp. 342, 119 App. Div. 782; aff'd, 189 N. Y. 544.

Where an answer raises an issue as to the possession of sufficient assets that can be applied, there should be evidence taken upon that issue and a decision and findings made. *Matter of Sherwood*, 75 App. Div. 342, 78 N. Y. Supp. 186.

Since the proceeding is now based somewhat on the failure of the representative to advertise for creditors, the court should take that fact into consideration as tending to show that he knew

the amount of assets and debts and considered that there was no necessity for the publication of the notice to creditors, and was ready to pay all just claims on demand. If the representative is not in that position, he should advertise for creditors in the usual manner.

Partial payment may be directed even where the estate is insolvent.

Where the debts against an estate have not been ascertained by the publication of a notice as required by the statute and it appears that the estate is insolvent, a decree should not be granted until either a settlement is had or the debts have been ascertained and become liquidated demands against the estate. But, on the contrary, when the debts against the estate have been ascertained and become liquidated demands against the estate, and there is money in the hands of the administrators applicable to the payment of such claims either in whole or in part, the authority and jurisdiction of the court exists to decree partial payment and the court should exercise such authority. *Matter of Miner*, 39 Misc. Rep. 605, 80 N. Y. Supp. 643.

Since under the present practice this application is made when notice to creditors has not been published, a careful inquiry should be made to ascertain the probable amount of debts, and the surrogate may take into consideration the fact that the representative did not advertise for creditors.

The decree and its effect.

An executor or administrator acting in good faith will be protected in paying a debt in full pursuant to an order, although it may finally turn out that the remaining assets are insufficient to fully pay the other creditors. But where the order has not been carried out, and a deficiency of assets appears, its execution cannot be insisted upon by the creditor. *Thomson v. Taylor*, 71 N. Y. 217.

The amended section (§ 2687) does not contemplate that the court will try or settle any question about which there is a reasonable doubt. Former section 2722 was based upon the theory,

which the revisers of 1914 thought was a wrong one, that the court should attempt in practically an *ex parte* proceeding to decide issues that might again be raised upon judicial settlement. Where such issues arise, their decision should be postponed and the proceeding dismissed. No creditor ought to have the right to procure the summary payment of his claim when there is any reasonable objection interposed by the representative.

Order has effect of decree.

An order to pay a claim based on a petition which instituted a special proceeding is a decree within the meaning of Code Civ. Pro., section 2548. *Matter of McMaster*, 14 Civ. Pro. R. 195 16 St. Repr. 240, 1 N. Y. Supp. 225.

Stay on appeal.

Where on appeal the enforcement of a decree is stayed, a proceeding under this section will not be allowed. *Matter of Moran*, 59 Misc. Rep. 133.

¶ 241 Rights, Powers and Duties of an Administrator with the Will Annexed.

Administrators with the will annexed; rights, powers and duties.

Where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators with such will have the rights and powers, and are subject to the same duties, as if they had been named as executors in the will.

Where power to mortgage, lease or sell real estate is given by a will to an executor or trustee, an administrator with the will annexed or a successor trustee may execute such power in any case where the original executor or trustee could execute the same, unless contrary to the express provisions of the will.

§ 2695, Code Civ. Pro.

Effect of revision. New section.

The first part of this section was found in former section 2613.

The latter part is new and is intended to fix the right of an administrator with the will annexed to execute a power of sale given in the will.

General powers.

The position of a general administrator and an administrator with the will annexed differs in this: That in the latter case, the will, so far as it is consistent with law, is the rule for the management and distribution of the estate, and in the former the ultimate right to the personal assets is regulated by the Statute of Distribution. *Casoni v. Jerome*, 58 N. Y. 315, 320.

If an inventory has been filed by his predecessor, he cannot be required to file one. If notice was duly given, by the former, to the creditors to present claims, and the time limited has expired while he was acting, no new notice should be given by the latter. If the estate is in a condition to be finally settled and distributed when it is devolved on the successor, he may proceed to the accounting at once. He simply steps into the place of the deceased legal representative, and his relations to the estate are precisely the same as those of his predecessor at the time of his death.

The authority of an administrator with the will annexed.

When such an administrator obtains an original appointment by reason of the failure of the testator to appoint an executor or by the death or refusal to qualify of one so named, he is vested with all the authority concerning the execution of the will that the original executor would have had.

Where an administrator is appointed upon the death of an executor who has partially administered the estate he takes up the duties of the office and continues them to their completion.

The acts of his predecessor are in general to be considered his acts and any rights which have been acquired against the testator or against his predecessor may be enforced against him.

Prosecution or defense of actions; appeal.

Such representative may carry on any litigation in which his predecessor was involved, and may appeal from any judgment against him. See § 115, Decedent Estate Law.

Where administrators *cum testamento annexo* are appointed and account for a trust fund in the hands of their testator, it is not proper to allow them from such fund the expense of their bond and of obtaining their letters. *Jewett v. Schmidt*, 45 Misc. Rep. 471; aff'd, 108 App. Div. 322.

Where the will gave the widow the use and possession of the whole estate with the right to use it up, and bequeathed what remained over — *held*, that the administrator *cum testamento annexo* could not recover bank deposits or securities standing in the name of the widow. *Matter of Seitz*, 17 App. Div. 1, 44 N. Y. Supp. 836; aff'g, 16 Misc. Rep. 522, 74 N. Y. St. Repr. 770, 40 N. Y. Supp. 206.

When power of sale may be executed. Decided under former rule.

It was due to the difficulty which the courts had in deciding when an administrator with the will annexed could execute a deed, as shown by the following cases, that caused the revisers to give the explicit general power contained in section 2695.

An imperative power of sale for the purpose of paying legacies passes to and must be exercised by the administrator *cum testamento annexo*. *Campbell v. Jennings*, 22 Misc. Rep. 406, 50 N. Y. Supp. 278.

"Authorize" held not to imply discretion which would not permit a sale by an administrator *cum testamento annexo*. *Ayers v. Courvoisier*, 101 App. Div. 97, 91 N. Y. Supp. 549.

Mandatory power of sale for purpose of distribution gives administrator *cum testamento annexo* power of sale. *Williams v. Williams*, 152 App. Div. 323, 136 N. Y. Supp. 990.

"With full power to sell and convey real estate" — *held* that an administrator with the will annexed might sell under the peculiar facts of that case. *Smith v. Bush*, 59 Misc. Rep. 648, 111 N. Y. Supp. 428.

Duty to continue unfinished litigation.

The administrator with the will annexed may find proceedings or other litigation which have been instituted by or against his predecessor that need to be completed by him.

When he finds such unfinished litigation, he should take the proper measures to be substituted in the place and stead of such predecessor so that the rights of the parties he represents may be protected. He should also make a careful examination and investigation as to all the acts of his predecessor, so that he may be fully informed as to the progress which has been made in the settlement of the estate, and may understand what matters require his immediate attention.

If an appeal is pending in which his predecessor has been a party, he may be substituted therein under sections 1297-1299, Code Civ. Pro.

¶ 242 General Powers, Et Cetera, of Temporary Administrator.

A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of these purposes, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, or upon any cause of action to which the decedent or absentee would have been a party in like manner and with like effect as if he were an administrator-in-chief. The surrogate may, by an order made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate; or, if it appears that the safety of the estate requires the notice to be shortened, the surrogate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fees on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof, according to sections 2687, 2688 of this chapter as though he were an executor or administrator.

§ 2597, Code Civ. Pro.

Effect of revision. § 2672 amended.

There has been added the right to bring an action against the temporary administrator upon any cause of action to which the decedent or absentee would have been a party.

Sections 2687, 2688 referred to are found in paragraphs 302, 290.

Notice of motion.

The application for an order under this section should be by a notice of motion, and not by petition and citation. It would be a much simpler and better practice if a notice of motion should be more often used in Surrogate's Court. In those cases, especially, where a proceeding has been already begun by petition, and the order asked for is in the nature of an incidental order in that proceeding, an application by notice of motion is a simple matter and is good practice, unless, of course, the terms of the section require that a petition shall be used.

General powers of temporary administrator.

A surrogate has no general equitable jurisdiction, and the broad powers of a court of equity cannot be claimed by him on the theory that, in some respects, he administers the limited jurisdiction granted to him upon equitable principles, and by the use of formal methods of procedure similar to those used in the Court of Chancery. And it is not accurate to say that a temporary administrator is an officer of the surrogate in the broad sense that a receiver is an officer of a court of equity. A surrogate has no power to administer an estate by taking it into his own possession, and, though he may, suitable facts appearing, nominate and appoint a temporary administrator pending a contest between the parties in interest, such temporary administrator exercises, when appointed, powers conferred and regulated by the statute and the control over him by the surrogate is such only as the statute prescribes. *Matter of Weisell*, 51 Misc. Rep. 325, 101 N. Y. Supp. 273.

He is a collector and conservator of the estate, and may bring, without special permission, only those actions necessary to reduce to possession the assets of the estate. *Hastings v. Tousey*, 123 App. Div. 480, 108 N. Y. Supp. 617.

Nature and extent of authority.

When a temporary administrator has been appointed pending a contest of the will, such administrator and not the executor named in the will is the lawful representative of such estate. So held as to service of attachment. *Matter of Flandrow*, 92 N. Y. 256; aff'g, 28 Hun, 279.

Upon entry of a degree admitting to probate a will and the granting of letters thereon, the powers of a temporary administrator end, even though an appeal is taken. *Matter of Choate*, 105 App. Div. 356, 94 N. Y. Supp. 176.

Leave to sue.

Application to sue temporary administrator denied where the alleged cause of action was very large, on the ground that the persons interested would not have an opportunity to defend the estate by counsel of their own choosing. *Matter of Fleming*, 5 Dem. 336.

Action maintained against temporary administrator to recover bank-book. *Harrison v. Totten*, 53 App. Div. 178, 65 N. Y. Supp. 725; rev'g, 29 Misc. Rep. 700, 62 N. Y. Supp. 754.

What expenses and charges.

This section wherein it specifies what charges, etc., the temporary administrator may be authorized to pay is restrictive and is intended to exclude all other classes of charges. So held where expenses of will contest were ordered paid. *Matter of Aaron*, 5 Dem. 362, 7 N. Y. St. Repr. 735; *Matter of Parish*, 29 Barb. 627.

Surrogate may allow temporary administrator to pay expenses of administration, the items to be considered and passed upon on judicial settlement. *Stokes v. Dale*, 1 Dem. 260.

As expenses of administration, a temporary administrator cannot be authorized to expend money to enable proponents to procure the attendance of expert witnesses upon the question of insanity. *Kruse v. Fricke*, 2 Dem. 264.

The rule is well settled that subject to the requirement of good faith and reasonable prudence an executor or administrator is entitled to employ an attorney for advice in reference to the management of the estate, and there can be no doubt that the power and duty of a temporary administrator in regard to the employment of counsel are analogous to those of a permanent administrator. Section 24 of chapter 460 of the Laws of 1837 provided that "Every collector so appointed shall have authority to collect the goods, chattels, personal estate and debts of the deceased, and to secure the same at such reasonable expense as the surrogate shall allow," and section 2597 of the Code is to the same effect. It provides that "The surrogate may also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust." *Matter of King*, 122 App. Div. 354, 106 N. Y. Supp. 1073.

Payment on legacy.

The temporary administrator may be required to pay a legacy even though a proceeding to revoke probate is pending. *Matter of Hughes*, 41 Misc. Rep. 75, 83 N. Y. Supp. 646.

Where a legatee who was contesting a will applied to have a temporary administrator pay on a legacy during proceedings for probate, and there was a provision that any legatee contesting should forfeit the legacy — *held*, that the petition should be dismissed under former section 2722, Code Civ. Pro. *Rank v. Camp*, 3 Dem. 278.

Sale by order.

The surrogate may order sale of horses and carriages to reduce expenses of caring for estate. *Matter of Cogswell*, 4 Redf. 241.

Power of temporary administrator ends when full letters are granted.

The power of a temporary administrator ends when full letters are granted even though an appeal is taken. *Matter of Choate*, 105 App. Div. 356, 94 N. Y. Supp. 176.

Section 2684, Code Civ. Pro., (now § 2624) applies to letters issued to temporary administrators which should be revoked by the decree granting probate. *Matter of Eisner*, 5 Dem. 383, 8 N. Y. St. Repr. 748.

Where a temporary administrator has begun a legal proceeding and is superseded by the appointment of an executor or of a permanent administrator, the proceeding cannot be continued by the temporary administrator. *Hastings v. Tousey*, 123 App. Div. 480, 108 N. Y. Supp. 617.

The title to property in possession of the temporary administrator passes at once to the holder of permanent letters. *People ex rel. Avery v. Purdy*, 155 App. Div. 607, 140 N. Y. Supp. 614.

¶ 243 *Idem*; Payment of Claims; Care of Real Property, and of Family of Absentee.

Idem; as to requiring creditors to present claims.

A temporary administrator, appointed upon the estate of either a decedent or an absentee, has the same power as an administrator-in-chief to publish a notice requiring creditors of the decedent or absentee to exhibit their demands to him. The publication thereof has the same effect, with respect to the temporary administrator, and also an executor or administrator, subsequently appointed upon the same estate, as if the temporary administrator were the executor or an administrator-in-chief, and the person to whom the subsequent letters are issued were his successor.

§ 2598, Code Civ. Pro.

Effect of revision. § 2673 amended.

By the former section advertisement for creditors could not begin until the expiration of six months after the appointment. Now it can be begun at once. See the next section which now authorizes payment of debts after the expiration of the publication.

Idem; as to paying debts.

At any time after the completion of the publication of the notice to creditors by a temporary administrator, the surrogate may, upon proof, to his satisfaction, that the assets exceed the debts, make an order, permitting the temporary administrator to pay the whole or any part of a debt, due to a creditor of the decedent or absentee; or, upon the petition of a creditor, a citation may issue to the temporary administrator, requiring him to show

cause why he should not pay the petitioner's debt. When such a petition is presented, the proceedings are, in all respects, the same as where a creditor presents a petition, praying for a decree directing an executor or administrator to pay his debt, as prescribed in this chapter.

§ 2599, Code Civ. Pro.

Effect of revision. § 2674 amended.

By the prior section notice to creditors can be published at once, and by this section debts can be paid at the expiration of notice. Often the object of temporary administration is to pay the debts, and this can now be accomplished without so long a time intervening.

Paying debts.

On application for leave to pay debts the surrogate will not try the validity of a claim, but he may deny leave to pay if the claim appears to be unfair or exorbitant. *Matter of Hamersley*, 15 Abb. N. C. 187.

Where the temporary administrator makes the application to pay certain debts, there is no provision for the trial of such claims on objections. If there are sufficient assets, permission should be given to pay the claims. *Mason v. Williams*, 3 Dem. 285.

In paying debts the temporary administrator cannot take into consideration real estate owned by the deceased, but must pay *pro rata* according to the personal estate in his hands. *Matter of Philp*, 29 Misc. Rep. 263, 61 N. Y. Supp. 241.

A surrogate has no jurisdiction to consider an alleged imposition upon a temporary administrator by a third person, even at the instance of a surety on the bond of the temporary administrator. *Matter of Weisell*, 51 Misc. Rep. 325, 101 N. Y. Supp. 273.

Idem; as to real property.

When a temporary administrator is appointed and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will or in the qualification of a trustee named therein, the order appointing him may confer upon

him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding.

Former § 2675.

§ 2600, Code Civ. Pro.

Power and duty as to real property.

A temporary administrator has no authority to mortgage the real estate of deceased, and an order of the surrogate empowering him to do so is not effective for such purpose. *Duryea v. Mackey*, 151 N. Y. 204; rev'g, 74 Hun, 638, 56 N. Y. St. Repr. 887, 26 N. Y. Supp. 1120.

The surrogate has no power to direct the payment to widow and children of rents of real estate pending probate. *Riegleman v. Riegleman*, 4 Redf. 492.

A temporary administrator of a testator whose will provided for the sale of the real estate has power to collect the loss under a fire insurance policy upon the burning of a building owned by testator and to maintain an action for the same. *Matthews v. Am. C. Ins. Co.*, 154 N. Y. 449; mod'g, 9 App. Div. 339, 75 N. Y. St. Repr. 716, 41 N. Y. Supp. 304.

The Supreme Court will not appoint a receiver of the real estate in partition where a temporary administrator has been appointed. *Weiher v. Simon*, 41 Misc. Rep. 202, 83 N. Y. Supp. 927.

Collection and disposition of rents.

No authority to collect rents is conferred generally upon an executor or administrator. It is manifest, therefore, that what the Legislature had in mind in enacting this section conferring such authority upon a temporary administrator was, not to impound the rents with a view to applying them to the payment of the decedent's debts, should that become necessary, but to have

the rents collected and preserved for the persons entitled thereto during the contest over and probate of a will, where conflicting claims to the rents were or might be made by heirs and devisees, and where the tenants might on that account refuse to pay, and no one might take sufficient interest or assume the responsibility of keeping the premises in repair. It is plain, therefore, that the powers and duties of the temporary administrator with respect to the personal property and with respect to the realty are separate and distinct, as is also his duty with respect to accounting therefor. It is evident that a temporary administrator has no authority to distribute the estate, but only to preserve it and account therefor to the court by which he was appointed, excepting that he may pay out rents as directed by the surrogate under the statute, as already seen. *Powell v. Demming*, 22 Hun, 235; *Matter of Goetz*, 120 App. Div. 10, 104 N. Y. Supp. 832.

Special powers of temporary administrator of absentee; may provide for family.

A temporary administrator, appointed upon the estate of an absentee, has all the powers and authority enumerated in the last section, with respect to the real property of the absentee. His acts, done in pursuance of that authority, bind the absentee, if living, or his heir or devisee, if he be dead, in the same manner as the acts of an executor or administrator bind his successor.

Upon proof, satisfactory to the surrogate, that the wife or any infant child of an absentee upon whose estate a temporary administrator has been appointed, is in such circumstances as to require provision to be made out of the estate for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts.

Former §§ 2676 and 2677 consolidated.

§ 2601, Code Civ. Pro.

Directions concerning deposit and withdrawal of money by temporary administrator, repealed.

Former §§ 2678, 2679, 2680 repealed. The temporary administrator is considered by the amendments of 1914 more as a permanent administrator or executor, and is held to much the same duties and obligations. As he gives a bond for the

assets, he should assume the responsibility for their proper deposit.

Former §§ 2682 and 2683 repealed.

A temporary administrator now advertises for creditors in the same time as a permanent representative and so the same rule as to "time" applies.

While former section 2683 might have been useful when the Code first went into effect, its usefulness has passed.

CHAPTER XLI.

Applying Rents and the Proceeds of Mortgage, Lease or Sale of Real Estate to the Payment of Debts, Funeral and Administration Expenses, and Charges upon Real Estate; Sale for Distribution and Conveyance in Confirmation of Title.

- ¶ 244. Proceeding outlined.
- ¶ 245. § 2701. Rents may be applied.
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- ¶ 246. § 2704. When disposition denied.
- ¶ 247. § 2703. For what purposes it may be had.
- ¶ 248. § 2705. Application on judicial settlement.
- ¶ 249. Defenses and objections.
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- ¶ 252. Proceeds of property sold in another court.
- ¶ 253. § 2708. Filing bond and executing order.
 - § 2709. Making report.
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 - § 2710. Effect of death.
- ¶ 254. § 2711. Report of proceedings.
- ¶ 255. § 2713. Retention of funds.
 - § 2749. Expenses and commissions.
- ¶ 256. § 2714. Effect of conveyance.
 - § 2715. Effect of conveyance on contract.
 - § 2716. Presumption of regularity.
 - § 2718. Restitution.

¶ 244 The Amended Proceeding for the Disposition of Rents and Proceeds of Mortgage, Lease or Sale of Real Property, Outlined.

The proceeding in Surrogate's Court to mortgage, lease or sell decedent's real estate for the payment of debts has always been cumbersome and expensive, and for many years has been the subject of just criticism by the members of the profession.

In the year 1904 radical changes were made, and the proceeding was in a measure simplified.

The revision of 1914 has made still more radical changes, which may be outlined as follows:

Application of rents of real property. § 2701.

By petition the representative may obtain authority from the Surrogate's Court to enter into possession of real property, and collect and hold the rents thereof, subject to their proper disposition upon judicial settlement in the same manner as proceeds of mortgage, lease or sale.

Property which may be mortgaged, leased or sold. § 2702.

Real property not exempt from levy and sale under an execution which cannot be disposed of under a valid power of sale.

Time for disposition limited. § 2702.

Cannot be disposed of unless a judicial settlement is begun within eighteen months from date of letters.

For what purposes. § 2703.

When there is not sufficient personal property to pay debts, funeral expenses, expenses of administration, transfer tax on real property, or debt or legacy charged thereon.

For payment and distribution to the heirs in certain cases.

Denied if bond given. § 2704.

Disposition may be prevented by giving a bond to pay all such charges.

When proceeding instituted and order made. § 2705.

Upon judicial settlement, when all interested parties are before the court or can be brought in.

Objections to order, or to claims. § 2706.

Any and all objections raised to the necessity for the disposition of the property or to the claims or expenses are determined upon judicial settlement.

Order to mortgage, lease or sell. § 2707.

Made upon judicial settlement after hearing objections.

Representative executes order after filing bond. §§ 2708, 2709.

After filing his bond the representative executes the order subject to the approval of the court, and makes his report on an adjourned day. The report may be either confirmed or rejected.

Report of execution of order, and of proceeds received. § 2711.

Mortgage, lease or sale is made and reported together with account of receipts and expenses. The court then having all accounts and all proceeds in hand, both of the real and personal estate, makes a final decree of judicial settlement as to both classes of proceeds.

Sale for the purpose of distribution, or execution of deed in confirmation of title. § 2711.

Sale may be ordered for distribution of proceeds to those entitled thereto. Proof may be taken as to who are the heirs-at-law or devisees, and conveyance may be ordered to them to make record title of their rights and interests.

Proceeds of sale by judgment of another court. § 2707.

Where the real property has been sold on foreclosure or partition, and the judgment directs the proceeds to be paid into Surrogate's Court, an order will be made directing payment thereof to the representative, upon his giving a proper bond (§ 2708) to be by him brought into the judicial settlement and paid out in accordance with the final decree.

For a history of the former statute upon this subject see *Personeni v. Goodale*, 199 N. Y. 323.

¶ 245 What Property, and the Rents and Proceeds Thereof, May be Applied. See ¶ 395.

When rents of real property may be received by the executor or administrator.

An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive the rents thereof. If from such petition it shall appear that a mortgage, lease or sale of such real property will be necessary unless the purposes specified in section 2703

of this title be otherwise fulfilled, a citation shall issue to all known persons within the state of New York who have the legal title to such real estate by descent or devise to show cause why the prayer of the petition should not be granted. Upon the return of the citation the surrogate may, in his discretion, grant the prayer of such petition upon such terms and conditions as justice shall require. The net rents so collected shall be held by the executor or administrator and be brought into court upon the judicial settlement of the account of such executor or administrator and there disposed of as provided in section 2711 of this title for the disposition of proceeds of mortgage, lease or sale of real estate.

§ 2701, Code Civ. Pro.

Effect of revision. New section.

This section is a new departure in the law of this state, providing as it does that a representative may enter into possession of the real estate left by the deceased and collect the rents, after presenting the facts to the Surrogate's Court, and obtaining its authority.

It has always been an injustice to creditors that the heir or devisee should be able to collect rents for many months from real estate which equitably belonged to the creditors. It has also worked injustice to resident and competent part owners that their interests should be sold when a few months rent would have discharged all the debts. Therefore, it has seemed to be wise and just, and within the power of the court, to authorize the representative to enter into possession of the real estate, when it may eventually be required to be mortgaged, leased or sold, and to collect the rents and bring them into court upon his judicial settlement to be accounted for and applied as may be necessary. This plan will also put someone in charge of real estate owned by non-residents, absentees or incompetents, where now no one has the right to collect the rents.

Many other states have a similar statute.

In many of the States, apart from any authority conferred by the will or by the consent of the heirs or the devisees, the executor or administrator is authorized to take possession of the real estate and collect the rents, pending the settlement of the estate,

for the protection of the rights of creditors, to the end that, should it be necessary to draw on the real estate to pay the debts, the rents thus collected may render a sale of the realty unnecessary, and it would insure the appropriation of all the real estate to the payment of the claims of creditors, should that become necessary. *Kline v. Moulton*, 11 Mich. 370; *Washington, v. Black*, 83 Cal. 290, 23 Pac. 300; *Cox v. Ingleston*, 30 Vt. 25.

Real property subject to disposition for the satisfaction of charges against the same and for distribution.

The real property, or interest in real property, of which a decedent died seized, may be disposed of as prescribed in this title; except where it is exempted from levy and sale by virtue of an execution as prescribed in title second of chapter thirteen of this act, or where it can be disposed of under a valid power contained in a will for the purpose for which the same might be disposed of under this title.

But no such property, or interest in property, shall be mortgaged, leased or sold under a decree in surrogate's court to satisfy any claim, debt, or demand, unless a proceeding for a judicial settlement, or to compel a settlement, of the accounts of an executor or administrator shall have been commenced within eighteen months from the date when letters first issued to an executor or administrator.

§ 2702, Code Civ. Pro.

Effect of revision. New section.

This section is taken in part from former section 2749 which is repealed. By the former section sale could not be had where the property was devised expressly charged with the payment of debts or funeral expenses, or where it was charged with the payment of a legacy and no power of sale given. By this section the exception is where it can be disposed of by a valid power contained in a will for the purpose for which it might be disposed of under this title. There is some difference between having land "charged" with a debt or legacy, and being able to mortgage, lease or sell it to pay such charge.

Under this section the three year lien which has existed is reduced to not more than eighteen months, and may be for only the few months elapsing before a judicial settlement can be had.

Any creditor can require a judicial settlement at the end of a year from the grant of letters and in some cases earlier, in which settlement he can ascertain whether the real estate must be applied to the payment of his debt and if so have it applied.

Under the former practice, the three years' lien might be extended much longer than that time by reason of the failure of any person to take letters or require them to be issued. *Matter of Eychner*, 65 Misc. Rep. 86, 120 N. Y. Supp. 1110. But under the new practice the lien is lost if some one does not have or require a judicial settlement to be instituted within eighteen months after the time when letters are first issued.

Sale where letters have been issued before September 1, 1914.

A practice act is to be applied at the time the step in the practice is taken, but not if thereby any person loses a substantial right. The right of the creditor to have a sale of the property is his "right" which must be considered, and there is no reason why, when made a party to the judicial settlement, a sale cannot be had under the new law, as no right of the creditor will be invaded.

If a creditor has not presented his claim, he has no standing to object to the settlement. Heretofore a proceeding for sale might have been brought the next day after letters were issued. The same thing may be said of the rights of the heirs or devisees. They may be deprived of the property at any time.

What property may be applied.

A deed made before death, but delivered and taking effect after death, does not impair the rights of creditors of the deceased and their lien upon the land is prior to any right of the grantee in such deed. *Rosseau v. Bleau*, 131 N. Y. 177.

Property out of the county.

A sale may be ordered of real estate situated out of the surrogate's county. *Long v. Olmsted*, 3 Dem. 581.

Proceeds of sale under a power.

Proceeds of the sale of real estate realized by the executor under a power of sale cannot be reached in proceedings to sell real estate. *Matter of Gedney*, 30 Misc. Rep. 18, 62 N. Y. Supp. 1023; *Matter of Coutant*, 24 Misc. Rep. 350, 53 N. Y. Supp. 713.

Dower interest.

The dower interest which a widow has in lands of which her deceased husband had been seized is, although unmeasured, liable in equity for her debts. *Payne v. Becker*, 87 N. Y. 153.

Property devised to a widow in lieu of dower should not be sold until all other real estate has been disposed of. *Matter of Dolan*, 4 Redf. 511.

Tenancy by entirety.

Where real estate is owned by husband and wife as tenants by entirety, the debts of the one so dying cannot be collected by sale of such property or of any interest therein. *Bertles v. Nunan*, 92 N. Y. 152; *Stelz v. Shreck*, 128 N. Y. 263; *Hiles v. Fisher*, 144 N. Y. 306.

Insurance by heirs.

The heirs may insure their own interest in real estate coming to them by descent, and in case of fire, the insurance money will not be liable for debts of deceased owner. *Herkimer v. Rice*, 27 N. Y. 163.

Insurance by representatives.

Where an intestate does not leave personal estate sufficient to pay his debts, but leaves real estate, the administrator may insure the buildings thereon and if they burn, the insurance money is applicable to the payment of debts as though it were proceeds of the sale of real estate. *Herkimer v. Rice*, 27 N. Y. 163.

Sale of Property Purchased with Pension Money. See ¶ 196.

Real estate purchased with pension money is not exempt from sale to pay debts and funeral expenses after death of pensioner. *Matter of Liddle*, 35 Misc. Rep. 173, 71 N. Y. Supp. 474.

The only express exemptions of real property from levy and sale by virtue of an execution prescribed by title 2 of chapter 13 of the Code of Civil Procedure are: *First*. A seat or pew occupied by the judgment debtor or the family in a place of public worship. Such interest, although in perpetuity, is a limited and usufructuary one, and is enumerated in the statute as personal property. § 1390, Code Civ. Pro. *Second*. Lands set apart as a family or private burying ground when designated as prescribed by law to exempt the same. §§ 1395, 1396, Code Civ. Pro. *Third*. A lot of land, with one or more buildings thereon, not exceeding in value \$1,000, and designated as prescribed by law as an exempt homestead. §§ 1397-1399, Code Civ. Pro.

By section 1393 of the Code of Civil Procedure there is no express exemption of real property from levy and sale by virtue of an execution. That section of said Code in terms exempts a pension granted to a person in the military or naval service of the United States or of a State, and certain equipments. The Federal government, by which the decedent's pension was granted, protects the pension money until it reaches the pensioner, or his family in case of his death. See § 4747, U. S. R. S. Its protecting care extends no further, and such money becomes general assets in the hands of the person or persons receiving it.

Prior to the decision of the case of *Yates County National Bank v. Carpenter* (119 N. Y. 550), it was quite uniformly held in this State that the exemptions from levy and sale by virtue of an execution, as stated in section 1393 of the Code of Civil Procedure, did not extend to property, real or personal, purchased by the pensioner with the pension money. By the decision in

Yates County National Bank v. Carpenter (supra), it was held that where pension money can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family such property is exempt. Apart from exemptions, property of which a person dies the owner is subject to the payment of his debts. Exemptions of property from levy and sale by virtue of an execution do not run with the property exempted, and are not incidents thereof, but are personal favors to the person exempted. The statutes provide what property shall be deemed assets of a decedent to be inventoried, and what property shall be set apart to a widow and the infant children of a deceased person, and real property, unless devised, descends to the heirs-at-law of the deceased.

That it was not the intention of the Legislature to extend the exemption of property purchased by pension money beyond the life of the pensioner is reasonably certain from the fact that it is not so stated in the statute and for the further reason that no provision is made for protecting a *bona fide* purchaser of the property from a stale claim of such exemptions. Express provision is made for a record in the office of the clerk or register of the county in the proper book for recording deeds of lands set apart as a family or private burying ground and for a record of exempt homesteads in a book kept for that purpose and styled the "Homestead Exemption Book." By section 1400 of the Code of Civil Procedure it is also provided when the exemption of a homestead shall continue after the owner's death, and the extent thereof. If we should hold that real property purchased with pension money remains exempt for the benefit of the widow and infant children after the death of the pensioner, what limit shall be placed upon such exemptions? Would the exemption cease at the death of the widow and on the children arriving at the age of twenty-one years? If it is the intention of the Legislature to extend exemptions of real property purchased with pension money beyond the death of the pensioner, it should be

so expressly stated, and provision should be made for giving notice thereof.

“We are of the opinion that the real property of the decedent in this case was not, at the time of the filing of the petition, exempt from levy and sale by virtue of an execution, and that the Surrogate’s Court had jurisdiction of the subject-matter of the proceeding.” *Matter of Liddle*, 35 Misc. Rep. 173; *Beecher v. Barber*, 6 Dem. 129; *Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667.

Proceeds of property taken by condemnation.

Damages awarded in condemnation and similar proceedings initiated before and after the death of the owner of the real estate so taken. *Matter of Thompson*, 89 Hun, 32; aff’d, 148 N. Y. 743, no opinion; *Magee v. Brooklyn*, 144 id. 265; aff’g, 3 Misc. Rep. 620; *Simms v. Brooklyn*, 87 Hun, 35; aff’d, 147 N. Y. 703, no opinion; *Gates v. DeLamare*, 142 id. 307; *Matter of City of N. Y.*, 30 Misc. Rep. 295, 62 N. Y. Supp. 379; *Matter of City of Rochester*, 110 N. Y. 159; *Home Ins. Co. v. Smith*, 28 Hun, 296; *Hill v. Wine*, 35 App. Div. 520, 54 N. Y. Supp. 892.

Devisee of real estate sold under condemnation proceedings subsequent to the making of a will is not entitled to proceeds thereof. *Ametrano v. Downs*, 170 N. Y. 388; aff’g, 62 App. Div. 405, 70 N. Y. Supp. 833; which aff’d, 33 Misc. Rep. 180, 67 N. Y. Supp. 128.

¶ 246 Proceeding Cannot be had When there is an Adequate Power of Sale, or where Bond for Payment is Given.

Under the present section it must appear that a mortgage lease or sale can be made by the executor under the direction and authority of the will, to deprive a person of his right to require the disposition of the property to satisfy his claim. Under former section 2749 the exception was where it was “devised expressly charged.”

Power of sale defeats proceeding.

A creditor cannot be deprived of his statutory remedy against the real estate unless the will of the debtor has provided a remedy as efficient and as expeditious. *Matter of Gantert*, 136 N. Y. 106-110; aff'g, 63 Hun, 280.

The power given must be imperative in terms and it must appear from express direction or be clearly gathered from the provisions of the testament.

It is not a matter of inference or implication. *Parker v. Beer*, 65 App. Div. 598, 72 N. Y. Supp. 955; aff'd, 173 N. Y. 332.

Where a power of sale is given by the will which is subject to the consent of any person, it must appear that such person has refused such consent before the proceeding will be entertained. *Matter of Davids*, 5 N. Y. St. Repr. 357.

There was given the executor the "management and control of my real estate with power to sell and convey same as I now possess (after my death)"—*held* a good power of sale to pay debts and that the proceedings could not be maintained. *Matter of Rowley*, 38 Misc. Rep. 622, 78 N. Y. Supp. 215.

"I authorize and empower such executors who act to sell and convey any real estate of which I die seized" is not such a power of sale as will deprive a creditor of a right to have sale for payment of debts. *Parker v. Beer*, 173 N. Y. 332; aff'g, 65 App. Div. 598.

Devise subject to payment of debts and legacies with power of sale to executor. Devisee refused to take the real estate and pay the debts and legacies, and the executor could not sell the same for sufficient to pay such charges—*held*, that where it was impracticable to exercise power of sale the proceeding could be maintained. *Matter of Wood*, 70 App. Div. 321, 75 N. Y. Supp. 272.

An insolvent testator cannot by charging certain debts on his real estate prefer one creditor over another in such a way as to deprive the general creditors of their right to have his real estate

sold and distributed among them. *Matter of Richmond*, 168 N. Y. 385; aff'g, 62 App. Div. 624, 71 N. Y. Supp. 1147.

An unexecuted discretionary power of sale will not deprive creditors of their right to a sale pursuant to statute, but where such power of sale has been exercised the proceeding to sell will not lie. *Personeni v. Goodale*, 199 N. Y. 323; rev'g, 132 App. Div. 928.

Sale to be refused if bond be given.

An order empowering an executor or administrator to mortgage, lease or sell shall not be granted if any of the persons interested in the estate or property execute and file in the surrogate's office a bond in such sum and with such sureties as the surrogate directs and approves, conditioned to pay all the charges against the same proved and allowed so far as the goods, chattels, rights and credits of the deceased are insufficient therefor, within such time as the surrogate may direct. Except that in a proper case the real estate may be sold for the purpose of distribution of the proceeds as provided in subdivision six of section 2703, notwithstanding the giving of such bond.

§ 2704, Code Civ. Pro.

Effect of revision. § 2765 amended.

The former section has been enlarged in its terms by including all the charges for which the property might be sold under the new practice, which besides debts and expenses of administration include, debts and legacies when charged upon the real property, and the transfer tax.

¶ 247 For What Purposes Disposition May be Had.

For what purposes real property is subject to disposition.

The real property specified in section 2702 of this title may be mortgaged, leased or sold for any or all of the following purposes:

1. For the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death.
2. For the payment of his funeral expenses, including therein suitable church or other services, a burial lot and a headstone erected thereon.
3. For the payment of the reasonable expenses of administration as allowed by the surrogate.
4. For the payment of any transfer tax assessed upon the transfer of such property.
5. For the payment of any debt or legacy charged thereupon.

No mortgage, lease or sale shall be ordered for the purpose of any of the

foregoing payments, if there be personal property applicable to the full payment and discharge thereof.

Such real property may also be sold:

6. For the payment and distribution of their respective shares to the parties entitled thereto, where any or all of said parties are infants, proven or adjudged incompetents, absentees, or persons unknown, whenever in his discretion the surrogate may so direct.

§ 2703, Code Civ. Pro.

Effect of revision. New section.

Part of former section 2749 has been incorporated into this section. The balance is new. Subdivision 1 is substantially as in the former section.

Subdivision 2 includes with funeral expenses, funeral services, a burial lot and a headstone, as they have in many instances been allowed as part of the funeral expenses.

Subdivision 3 settles a much discussed problem under the former law. Such expenses are allowed because there must be a representative to administer the estate in the interest of the creditors who must pay the expenses of his appointment, and of advertising for creditors, making inventory, and of bringing the estate to the point of judicial settlement. Expenses for all these things are necessary in the interest of the creditors.

Subdivision 4 is in accordance with the present Tax Law, § 224, which in itself gives this right.

Subdivision 5 covers cases where debts or legacies are charged on the land, and no adequate provision is made for their payment by authority to mortgage, lease or sell.

Provision is also made for a sale for the purpose of distribution when the parties interested are for any of the reasons mentioned incapable of making a sale themselves.

Character of claim which gives the right to make the application.

The debt must be one based upon the obligation of the deceased at the time of his death, and not upon the obligation of the executor or administrator except for funeral and administration expenses. *Matter of Catlin*, 57 Misc. Rep. 269, 109 N. Y. Supp. 542.

Person claiming to be a creditor on a claim for a monument at the agreed price of \$443 purchased by the administrator was allowed to institute the proceedings and have a decree of sale under the old practice. *Matter of Laird*, 42 Hun, 136, 3 N. Y. St. Repr. 376.

Claim against the devisee.

Where the widow was sole devisee, a claim against her husband is a claim against her on proceedings to sell her real estate so acquired. § 101 Dec. Est. L.; *Matter of Fielding*, 30 Misc. Rep. 700, 64 N. Y. Supp. 569.

Amount due committee of a lunatic.

The amount found to be due the committee of a deceased lunatic on accounting is a claim in proceedings to sell the real estate of the lunatic to pay his debts. *Kowing v. Moran*, 5 Dem. 56.

Debt of infant.

An infant not being liable for his own support, but the same devolving upon his father, his real estate cannot be sold in this proceeding. *Matter of Igglesden*, 3 Redf. 375.

Pendency of another action; stay.

A stay will not always be granted because a partition action is pending. *Ryan v. Benjamin*, 128 App. Div. 51, 112 N. Y. Supp. 441.

Claim of subrogation.

It has been held in some cases that a person paying debts of the deceased was subrogated to the rights of the creditors whose claims were so paid even though no assignment was taken. *Matter of O'Brien*, 39 App. Div. 321, 56 N. Y. Supp. 925; *Matter of Quatlander*, 29 Misc. Rep. 566, 61 N. Y. Supp. 1064. But in *Matter of Rider*, 68 Misc. Rep. 270, 124 N. Y. Supp. 1001, where the payment was voluntary it was held that there was no subrogation.

Judgment for costs.

A judgment for costs granted in a suit begun in the lifetime of deceased and continued after his death by his executor is not a debt of deceased for the payment of which real estate may be sold. *Matter of Foley*, 39 App. Div. 248, 57 N. Y. Supp. 131.

Where judgment has been obtained against a surviving partner, costs are not part of the debt to be paid by the real estate of the deceased partner. *Matter of Stowell*, 15 Misc. Rep. 533, 74 N. Y. St. Repr. 296, 37 N. Y. Supp. 1127.

Costs included in a judgment are not preferred in payment, but are to be treated as part of the judgment. *Shute v. Shute*, 5 Dem. 1.

When a debt or legacy is charged on the real estate. See ¶¶ 238, 297, 306.

Mere lack of personal estate to pay debts will not of itself show an intention to charge debts upon real estate. *Matter of City of Rochester*, 110 N. Y. 159; rev'g, 46 Hun, 651.

The formal words of a will, "after the payment of my debts," etc., do not charge the real estate with the payment of debts. *Matter of Van Vleck*, 32 Misc. Rep. 419, 66 N. Y. Supp. 727; *Matter of O'Brien*, 39 App. Div. 321, 56 N. Y. Supp. 925.

Real estate held not to be charged with the payment of debts where there was a direction to pay debts and a power of sale given. *Matter of Bingham*, 127 N. Y. 296; *Matter of Powers*, 124 id. 361.

A direction to pay certain debts from "my estate" is not sufficient to charge such debts upon real estate. *Lediger v. Canfield*, 78 App. Div. 596, 79 N. Y. Supp. 758.

¶ 248 Application is Made on Judicial Settlement; Jurisdiction of Necessary Parties.**When and how real property may be mortgaged, leased or sold.**

Upon a judicial settlement of the accounts of an executor or administrator, any party to the proceeding may allege and show by proof that the personal property left by the decedent is insufficient for the payment of the just demands and charges against the same; or that the circumstances are such that the court has jurisdiction to order the mortgage, lease or sale of the real

property left by the deceased for any of the reasons specified in section 2703. The petition and account filed in the proceeding shall be sufficient proof of the facts therein stated unless an issue is raised as to any of such statements. If any person interested in such real estate, or in any question raised with reference to the mortgage, lease or sale thereof, is not a party to such judicial settlement, the surrogate, before proceeding further shall cause such person to be brought in by supplemental citation.

§ 2705, Code Civ. Pro.

Effect of revision. New section.

Instead of a separate proceeding with its attendant delay and expense, the mortgage, lease or sale is made a part of the judicial settlement when generally all interested parties are before the court. All of the questions arising can then be determined in one decree, and the rights and interests of all parties, both in the personal and real estate, can be properly protected.

The application is not made by the filing of a petition and the issuing of a citation. It is part of the judicial settlement. If any necessary parties are not parties to the judicial settlement they should be brought in by supplemental citation.

A person who has purchased the real estate under a referee sale in partition between the heirs is a "person interested" and should be brought in and allowed to contest. *Kammerrer v. Ziegler*, 1 Dem. 177.

One holding a chose in action against a devisee or heir-at-law which has not yet ripened into a lien upon or interest in the property has no interest in the proceeding. *Richmond v. Freeman's Nat. B.*, 86 App. Div. 152, 83 N. Y. Supp. 632.

A judgment creditor of an heir is interested. *Matter of Townsend*, 203 N. Y. 522.

Persons not cited may make themselves parties to the proceeding. See ¶ 46.

A creditor of the decedent, including one whose claim is not yet due,

A person having a claim for unpaid funeral expenses, or

An heir or devisee or a person claiming under an heir or devisee of the property,

May appear in person and make himself a party to the proceeding, or demand that he be allowed to intervene.

Application may be made by notice of motion.

The application to intervene may be made by a notice of motion entitled in the proceeding, and served, with the affidavit upon which it is based, upon all the parties who have appeared in the proceeding.

¶ 249 Defenses and Objections Which May be Raised and Who May Make Them.

Heir or devisee or person claiming under him may interpose a defense.

An heir or devisee or person claiming under him may contest the necessity of applying the property for the payment of debts, or for any other of the purposes for which it is sought to be disposed of, or the validity of a debt due or unpaid represented as existing against the decedent, or the reasonableness of the funeral expenses, or of the administration charges.

A person who has taken title from the heir or devisee may contest the proceeding. *Matter of Kinn*, 136 App. Div. 852, 122 N. Y. Supp. 26.

A creditor is a party for the sole purpose of proving his own claim or contesting the claim of another creditor. He cannot raise an issue as to the necessity of the proceeding and, therefore, should not be allowed to file an answer or objection. *Matter of Campbell*, 66 App. Div. 478, 73 N. Y. Supp. 290.

A creditor cannot object to evidence under section 829, Code Civ. Pro. *Jones v. Le Barron*, 3 Dem. 37.

The pendency of another proceeding for the purpose of paying debts is a good answer to the application. *Matter of Laird*, 42 Hun, 136, 3 N. Y. St. Repr. 376.

Any person interested in the estate as heir, devisee, legatee, or creditor may, without the concurrence of the executor, interpose the Statute of Limitations as a defense to a claim brought against the estate. *Butler v. Johnson*, 41 Hun, 206, 4 N. Y. St. Repr. 151; aff'd, 111 N. Y. 204.

Defense that the personal estate was sufficient.

Where there were sufficient personal assets but the representative has misapplied them, the decree should be refused. *Matter of Very*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389.

If the administrator wastes or squanders the personal property so that it becomes insufficient to pay the debts, the only resort of the creditors is to such administrator to enforce his personal liability therefor. *Kingsland v. Murray*, 133 N. Y. 170; aff'g, 60 Hun, 116.

Debt due from an insolvent administrator is not in this proceeding treated as cash on hand. *Matter of Georgi*, 21 Misc. Rep. 419, 47 N. Y. Supp. 1061; aff'd, 162 N. Y. 660; aff'g, 44 App. Div. 180.

¶ 250 Trial and Determination of Claims and Expenses; Statute of Limitations.

If any claim, demand, charge, or expense set forth in the account or presented on the judicial settlement is objected to by any party to the proceeding whose interest will be affected by its allowance or disallowance, such claim, demand, charge or expense shall be determined, notwithstanding its admission or allowance by the executor or administrator. Where a defense arises under the statute of limitations as to a claim so admitted or allowed the said claim shall be deemed to be rejected by the executor or administrator at the time of such objection, and the time between the presentation of the claim, or the commencement of an action where the claim was not presented, and the time of such objection shall not be a part of the time limited in this act for commencing an action thereon.

A judgment recovered against the executor or administrator upon a claim against decedent shall be prima facie evidence and proof of the claim against the real property of decedent, and the burden of disproving such judgment or of proving that the claim upon which it was rendered is invalid, or that the judgment was obtained by collusion, shall be upon the party disputing or objecting to the same.

§ 2706, Code Civ. Pro.

Effect of revision. New section.

The first part of the section is new but contains the same in substance as to proving a claim objected to as former section 2755. The last part of the section is taken from former section 2755.

Effect of allowance or admission of claim.

The admission or allowance by the executor or administrator of a claim or debt of any creditor against the decedent will, for the purpose of such proceeding, be deemed an establishment thereof unless objection be made thereto by a party to the special proceeding.

The effect of an allowance of a claim to be paid out of personal property differs from the effect of allowing it to be paid out of real property. (See § 2680, ¶ 220.)

Where it is to be paid from personal estate the executor or administrator acts, in allowing it, as the representative of the next of kin, and such allowance is binding upon them, except in cases where the allowance is fraudulently or negligently made.

But as to the heirs and devisees the executor or administrator stands in another relation, and his allowance of a claim is not binding upon them. They can accept and ratify his action by failing to object to the claim, and when they do not object to it, the allowance obviates the necessity of making formal proof.

Where objection is made to a claim, or to the allowance of a claim, the debt must be proved.

Where real estate devised or descended is sought to be charged with the debts of the decedent, the validity and existence of the debts are open to contest by the heirs or devisees in the proceeding and the decree of the surrogate on the accounting does not conclude them and except in case of a judgment recovered against the executor or administrator on the merits is not even *prima facie* evidence of the existence of the debts. *Long v. Long*, 142 N. Y. 545; rev'g, 66 Hun, 595; *O'Flynn v. Powers*, 136 N. Y. 412.

Judgment is prima facie evidence of validity of claim.

By section 2706 the recovery of a judgment upon a claim makes such judgment *prima facie* evidence and proof of the claim, and the burden is upon the objector to prove that the claim was invalid, or that the judgment was obtained by collusion. See ¶ 220.

Effect of rejection of a claim.

The Surrogate's Court has always had jurisdiction to try a rejected claim on proceedings to sell real estate without the consent of the parties which was necessary when the claim was to be paid from personal estate. There never seemed to be a very strong reason for maintaining this difference in practice, and it has been changed by the recent amendments. (See § 2680, ¶ 220.)

The fact that a claim was presented to and rejected by the administrator does not deprive the surrogate of jurisdiction to determine its validity in a proceeding for the sale of real estate to pay debts. *Merchant v. Merchant*, 25 N. Y. St. Repr. 268, 6 N. Y. Supp. 875; *Matter of Haxtun*, 102 N. Y. 157; *Turner v. Amsdell*, 3 Dem. 19, disapproving *Matter of Glann*, 2 Redf. 75.

Trial by jury of controverted question of fact.

A trial by jury may be had of any controverted question of fact, including objections to the allowance of a claim, under the general authority of the court to conduct jury trials, or the questions may be certified to the Supreme Court for trial. See § 2538, ¶ 31.

This includes the issue as to the title to the property alleged to belong to the deceased, when an issue thereon is raised by any party to the proceeding. Jury trial in proceedings to sell real estate is not new, for it was specially authorized by former section 2547.

Expenses of administration.

The surrogate will be required to exercise a sound discretion in fixing and allowing the expenses of administration to be paid from the proceeds of the disposition of the real estate, in order to prevent abuses arising under this new provision. He should consider the reasons for the change in the rule, bearing in mind that the expenses to be allowed are those made necessary in order

that a representative of the estate may be in office, that he may ascertain and come into possession of the personal estate and may ascertain the debts which are justly due and owing. These are things necessary to be done to make the title of the heir or devisee good, and the reasonable expenses thus incurred should be paid from the proceeds of the real estate. This is the view which was taken by the surrogate of Kings county in the *Matter of Liscomb*, 60 Misc. Rep. 647, 113 N. Y. Supp. 941, decided before the amendments of 1914.

Statute of limitations.

The effect of the allowance of a claim by the representative by the present practice makes such claim a settled and liquidated claim (§ 2680, ¶ 220) and the statute of limitations ceases to run from that time. (§ 2706.) But where such claim is objected to on the hearing in proceedings to dispose of real estate, the time between the allowance and the time of such objection is not a part of the time limited for the commencement of an action, and the claim shall be deemed to be rejected at the time such objection is made. Such rejection however does not give the claimant the three months' time from that date to bring his action in the Supreme Court (§ 2681, ¶ 223) for the reason that the Surrogate's Court in proceedings to dispose of real estate has the right to try any and all claims without the consent of the parties.

¶ 251 Granting Order to Mortgage, Lease or Sell; Contents Thereof.

Order to mortgage, lease or sell.

If it shall appear that it is a proper case for the disposition of the decedents' real estate, as provided in this title, on account of deficiency of personal estate, the surrogate shall make an order reciting the determination made, the amount and general nature of the various claims and demands which have been admitted or proved, a description of the property to be disposed of, and directing the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest therein, as the surrogate therein directs.

If it appears that one or more distinct parcels of which the decedent died

seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.
2. Property so descended which has been sold by them.
3. Property which has been devised which has not been sold by the devisee.
4. Property so devised which has been sold by the devisee.

Where an order is made directing the sale of the property, or interest, for distribution only, the order shall fix and determine the rights and interests of the respective parties therein, and if a person entitled to an estate or interest in the property sold is made a party as a person unknown, the court must provide for the protection of his rights, as far as may be, as if he were known and had appeared.

The proceeds of the sale of any real property sold by judgment of another court, which directs said proceeds to be paid into the surrogate's court subject to its order, may be directed by such order of the surrogate to be paid to the executor or administrator to be brought into the account on such judicial settlement and disposed of in accordance with the decree made thereupon.

After making the order for mortgage, lease or sale, the surrogate shall adjourn the judicial settlement to await the proceedings taken under the order.

§ 2707, Code Civ. Pro.

Effect of revision. § 2757 amended.

If it appears from all the facts presented and proved that the real estate should be mortgaged, leased or sold for any of the purposes mentioned, the court makes an order reciting the reasons appearing, the amount of the claims and expenses allowed, a description and amount of the property to be disposed of, and the order in which sale shall be made, if a sale is directed, and directing the representative to file a bond in the amount fixed, and proceed to execute the order.

If the property has already been sold in another court and the proceeds directed to be paid into Surrogate's Court, the order instead of directing a mortgage, lease or sale, directs the proceeds to be paid to the representative. If the property is to be sold for distribution, the order recites that fact, and who are the persons entitled to share in the proceeds, and their respective rights therein.

An adjournment is then taken to await the report of the representative.

Quantity to be sold.

How much real estate shall be sold is in the discretion of the surrogate, and he may order more sold than enough to pay the debts where to order a sale of less would prejudice the interests of the heirs. *Matter of Dolan*, 88 N. Y. 309.

Right of life tenant to be considered in sale.

Where any party to the proceeding has an existing or inchoate right of dower, or where any party to the proceeding has a tenancy by curtesy, or an estate for life or for years in the real estate directed to be sold, the court must determine whether the interests of all the parties will be better protected, or a more advantageous sale can be made of such real estate by including the sale of such right or interest; and if the court shall so determine there may be included in the order a direction that such right or interest be sold; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. The regulations and provisions of article two, title one of chapter fourteen of this act, prescribing the rules of practice in relation to the right of dower, curtesy and estates for life, or for years in actions for the partition of real estate, so far as the same may be applicable, shall govern and control the disposition of moneys realized on such sale which shall belong to the owner of said right of dower, or tenant for life, or for years.

§ 2717, Code Civ. Pro.

Effect of revision. § 2800 amended.

The change in this section consists in including therein the adjustment of the rights of life tenants or tenants for years.

Tenancy by curtesy. See ¶ 309.

Where the husband is entitled to a tenancy by curtesy in the real estate sold, it attaches only to the surplus after payment of debts, and is not a lien or interest prior to the lien of the debts. *Arrowsmith v. Arrowsmith*, 8 Hun, 606.

It was held in *Arrowsmith v. Arrowsmith* (8 Hun, 606), that the surrogate could not dispose of the part of the surplus representing the value of the tenancy by curtesy of the husband to a creditor of his.

Dower of widow in surplus on mortgage foreclosure. See ¶ 310.

Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus

remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

§ 194, Real Property Law.

The widow is entitled to have set apart for her use one-third of the gross proceeds of sale, as she is not compelled to contribute to expenses of sale. *Higbie v. Westlake*, 14 N. Y. 281.

Agreement for Assignment of Dower and Its Effect; Descent Subject to Dower. See ¶ 310.

Agreements between the parties constituting assignments or admeasurements of dower are recognized by the courts as effectual for that purpose where the intention is clearly manifest. *Aikman v. Harsell*, 98 N. Y. 186, 192.

Where the husband takes land by descent from his father subject to the dower of his mother in the same and the dower is afterward assigned to her, such assignment relates back to the death of the father, so as to deprive the widow of the son who dies in the lifetime of his mother of dower even in the reversion of the third of the estate which is assigned to the mother for dower. *Dunham v. Osborn*, 1 Paige, 634; *Howells v. McGraw*, 97 App. Div. 460, 90 N. Y. Supp. 1.

Allowing gross sum for life estate.

Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of five per cent. on the principal sum, during the probable life of such person, according to the Carlisle Table of Mortality.

Sup. Ct. Rule LXX.

In *Matter of Shadbolt*, 72 Misc. Rep. 591, 131 N. Y. Supp. 989, this rule 70 was construed as only applying to money "paid into court."

Where surplus money is to be distributed after foreclosure, a
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life tenant under a will may elect to take a gross sum in lieu of the income, but such tenant cannot be forced to such election. It is discretionary with the court to allow such election, and it will not be allowed where such course would seem to be contrary to the intention of the testator. *Matter of Zahrt*, 94 N. Y. 605; *Luce v. Burchard*, 78 Hun, 537, 540, 29 N. Y. Supp. 215.

Consent of remainderman.

The election by the life tenant may in a proper case be allowed even against the objection of the remainderman and even where the persons entitled to the remainder are uncertain. *Jermain v. Sharpe*, 29 Misc. Rep. 258, 61 N. Y. Supp. 700. (Rule 70, Sup. Ct.)

¶ 252 Disposition of Proceeds of Sale of Real Property Had in Another Court, which were Directed by the Judgment to be Paid into Surrogate's Court.

Former §§ 2798, 2799 created a procedure for reaching and applying proceeds of a foreclosure of mortgage, but did not include proceeds of a partition sale. Very often in actual practice it was found that the Supreme Court ordered proceeds of partition sale paid into Surrogate's Court, even though there was no provision in the code for a distribution of such fund to the creditors through that court.

The amendments of 1914 make no distinction between proceeds of foreclosure or partition sale, provided the Supreme Court has by its judgment ordered the proceeds paid into Surrogate's Court for further distribution.

The Supreme Court has the clear right to retain control of such funds, and allow no other court to direct how or to whom they shall be paid, and it also may place such funds within the jurisdiction of another court. The practice which has grown up of giving the Surrogate's Courts jurisdiction of such funds is of great convenience to all the parties interested and results in the saving of much time and expense to creditors of persons who

died possessed of real property which must be applied in some way to the payment of debts.

Where such an order is made the Supreme Court under the law delegates its power to distribute the fund to the Surrogate's Court, and thereby the surrogate is invested with full authority to pass upon the priority of conflicting claims to the fund as between the heirs and devisees as distinguished from their validity.

An answer which seeks to raise a question involving the title to real estate or the validity of the will does not oust the surrogate of jurisdiction. *Matter of Stilwell*, 139 N. Y. 337; aff'g, 68 Hun, 406, 23 N. Y. Supp. 65.

The surrogate has jurisdiction to try the issue of title, granting a jury trial thereof if demanded. Before the amendments of 1914 he had that right, so far as directing a jury trial, under former section 2547.

After such sale of decedent's real estate, the surplus money remaining is to be treated as real estate, and is subject to the lien of creditors of the decedent, and liable to have such debts of the decedent enforced therefrom as remain unpaid after exhausting the personal assets of the deceased.

The object of the legislation seems to have been to guard the surplus money and to place the fund where the same may be subject to the action of the Surrogate's Court having jurisdiction of the estate of the decedent. *Felts v. Martin*, 20 App. Div. 60, 46 N. Y. Supp. 741.

There is no difference in principle between such surplus and a parcel of the realty remaining unsold after a sale of enough to satisfy the judgment of foreclosure. *Fliess v. Buckley*, 22 Hun, 551.

All the parties to the original action are bound by the direction in the judgment to pay the fund into Surrogate's Court, and if aggrieved thereby their remedy is to move to resettle the judgment or to appeal. Where the judgment does not direct payment into Surrogate's Court, the Supreme Court may upon proper notice amend the judgment or make a further order to that effect.

The judgment of the court in which the sale is had must direct payment of any surplus into surrogate's court.

It is a prerequisite to any jurisdiction of the Surrogate's Court over the fund, that there shall be a judgment through which it acquires jurisdiction. (§ 2707.)

Where the judgment does not so direct, and it is desirable that such proceeds should be distributed by the Surrogate's Court, an application should be made, upon notice to all parties who appeared in the Supreme Court, for leave to amend the judgment in that particular.

An *ex parte* order transferring the fund from the Supreme to the Surrogate's Court cannot be obtained by a person not a party to the foreclosure proceedings without notice to all the parties to the action. *Washington L. Ins. Co. v. Clark*, 79 App. Div. 160, 79 N. Y. Supp. 610.

A judgment creditor cannot have his judgment paid in surplus money proceedings after mortgage foreclosure, but should apply to have the fund transferred to Surrogate's Court and proceed there. *Di Lorenzo v. Dragone*, 25 Misc. Rep. 26, 54 N. Y. Supp. 420; *Powell v. Harrison*, 88 App. Div. 228, 85 N. Y. Supp. 452.

The surplus arising on mortgage foreclosure must be paid into Surrogate's Court by paying the same to the county treasurer pursuant to section 2699, Code Civ. Pro. *Coe v. Cobb*, 50 App. Div. 80, 63 N. Y. Supp. 439.

Where real estate devised to an infant has been sold in proceedings for that purpose, the fund in the hands of the special guardian cannot be ordered to be paid over in satisfaction of a debt of deceased without resort to the statutory proceedings for sale in Surrogate's Court. *Long v. Long*, 142 N. Y. 545; rev'g, 65 Hun, 595, 21 N. Y. Supp. 871.

When surplus not payable into surrogate's court.

Where in an action to foreclose a mortgage the sale is made more than eighteen months after the issuance of letters and no proper proceeding has been begun in Surrogate's Court, the surplus is not payable into Surrogate's Court, but is distributed in

surplus money proceedings in Supreme Court. *Reynolds v. Britton*, 56 Misc. Rep. 67, 106 N. Y. Supp. 937.

An order making the surplus subject to the order of the surrogate will not be granted when the sale takes place more than two years after the issuance of letters. *White v. Poillon*, 25 Hun, 69.

Where the real estate was subject to a valid power of sale to pay debts and the same has been sold in mortgage or partition proceedings, the surplus is still subject to such power, and the Surrogate's Court has no jurisdiction to act. *Matter of Coutant*, 24 Misc. Rep. 350, 53 N. Y. Supp. 713; *Matter of Gedney*, 30 Misc. Rep. 18, 62 N. Y. Supp. 1023.

Where a judgment of foreclosure has inadvertently directed the surplus in such a case to be paid into Surrogate's Court, the judgment should be amended and the surplus withdrawn from the Surrogate's Court and disposed of by the Supreme Court in accordance with the will of the deceased. *Matter of Coutant*, 24 Misc. Rep. 350, 53 N. Y. Supp. 713.

Protection against irregular payment.

Where surplus money needed to pay debts has not been ordered paid into Surrogate's Court and has been withdrawn from the county treasurer in surplus money proceedings the Supreme Court has jurisdiction to compel a restoration of the fund. *Felts v. Martin*, 20 App. Div. 60, 46 N. Y. Supp. 741.

Proceeds of sale in partition can not be ordered paid into surrogate's court as a matter of right.

Notwithstanding the fact that the Supreme Court often directs by its judgment that the surplus of proceeds be paid into Surrogate's Court, yet under section 1538, Code Civ. Pro., the direction seems to be that such proceeds shall remain within the jurisdiction of the Supreme Court.

Obtaining payment from supreme court.

Where no proceeding for the disposition of the real estate for the payment of debts is pending, the fund may be withdrawn

from the Supreme Court by an application under section 1538, Code Civ. Pro.

Where a proceeding is pending in Surrogate's Court, and the proceeds of a sale in partition have not been ordered paid into Surrogate's Court, the latter court may ascertain and fix the debts which cannot be paid from the personal estate by an order or decree, upon which a creditor may apply to the Supreme Court for payment of the debt so specified. This may be done on judicial settlement in the same manner as though the real estate were to be sold.

The surrogate may progress a proceeding begun to reach such surplus to the point of determining the just debts of the deceased which are payable from his real estate. The decree should be so framed as to enable a successful creditor to enforce a bond given as prescribed for the withdrawal of the fund. *Matter of Dusenbury*, 34 Misc. Rep. 666, 104 N. Y. St. Repr. 725.

Persons who should be parties to the judicial settlement where proceeds of partition are sought to be reached.

Under the former practice of instituting the regular proceeding and progressing it to a decree establishing the debts and all jurisdictional facts, and then proceeding upon that decree in Supreme Court, it was necessary, as now, to obtain jurisdiction of all interested parties. The objection was made in *Griswold v. McDonald*, 81 Misc. Rep. 376, that the necessary persons had not been made parties because tenants and others who would have been necessary parties if the real estate had not been sold, were not made parties to the proceeding instituted after such sale.

It was held that the court in determining who were necessary parties should be governed by the conditions existing at the time the petition was filed, and that persons, like tenants, having no rights or interests to be protected or enforced were not necessary parties.

Under the present practice the proceeding being conducted upon the judicial settlement and as a part of it, those persons

who are not parties, but who are interested in the determination of any question to be determined should be brought in by supplemental citation.

Application for distribution of surplus after time to make sale expires.

Decided under the three year limitation.

Where the land has been sold in foreclosure and the surplus deposited subject to the order of the surrogate he may entertain a petition by a creditor after the lapse of three years and direct payment of his claim from the surplus. *Matter of Callaghan*, 69 Hun, 161, 52 N. Y. St. Repr. 537, 23 N. Y. Supp. 378; *Matter of Bernstein*, 58 Misc. Rep. 115, 110 N. Y. Supp. 473.

In the case of *Lord v. Anderson*, 66 Misc. Rep. 593, 122 N. Y. Supp. 218, application for distribution made after four years from grant of letters was denied on the ground that the Surrogate's Court had no jurisdiction. The above cases were referred to as not deciding the precise question. The Lord case does not show when the sale was made within four years from grant of letters. If so made and the surplus was paid into Surrogate's Court, it would seem that the cases above mentioned are the better authority.

A claim or judgment against testator or his executor remains a lien on his devised real estate for three years, and after that such claim is against the devisees personally and does not follow the real property devised by or descending from such devisees, and such a claim after three years cannot be paid from the proceeds of a partition sale. *Platt v. Platt*, 105 N. Y. 488.

¶ 253 Executing the Order and Making Report; Confirmation or Rejection Thereof.

Duty of executor or administrator to execute order after filing bond.

Before proceeding to execute the order directing that property be mortgaged, leased or sold the executor or administrator must first execute and file with the surrogate his bond, with two or more sureties, to the people of the state in a penalty fixed by the surrogate, conditioned for the faithful performance of the duties imposed upon the principal by the order and for the accounting by the principal for all moneys received by him whenever he is required so to do by a court of competent jurisdiction; unless the order directs that the

proceeds of sale or mortgage be paid by the purchaser or mortgagee to a bank or trust company to the credit of the executor or administrator, subject to the further order of the court.

§ 2708, Code Civ. Pro.

Effect of revision. § 2758 amended.

The penalty of the bond is fixed by the surrogate. The order may make the giving of a bond unnecessary by directing that the proceeds be paid by the purchaser or mortgagee to a bank or trust company to the credit of the representative, subject to the further order of the court.

The bond is required when proceeds of sale in another court are directed to be paid to the representative, as well as when he makes a mortgage lease or sale.

Proceeding to release surety.

The proceeding to release a surety under section 2600 (now § 2579), Code Civ. Pro., does not apply to a bond given under this section. *Matter of Lawyer's Surety Co.*, 25 Misc. Rep. 136, 54 N. Y. Supp. 926.

Order to be executed and report made.

The executor or administrator shall thereupon execute the order, subject to the approval of the court, and make a report of his proceedings thereunder. The surrogate may confirm or reject the mortgage, lease or sale, extend the order to other parcels, or require a re-execution of the order upon such terms and on such conditions as he may direct, and he may relieve a purchaser from his purchase in a case where he might be so relieved in the supreme court, on such terms as justice shall require.

§ 2709, Code Civ. Pro.

Effect of revision. New section.

On the adjourned day the representative shall make a report of his proceedings under the order. Such proceedings must be had subject to the approval of the court. If he has made a contract for sale that contract should be submitted, or the terms upon which he has agreed to mortgage or lease must be set out.

The report is then before the surrogate for such action as he may see fit to take upon it, any party interested having the right to make any objection thereto.

Allowance on bid to creditor purchasing.

If, upon a sale for any purpose other than the distribution of the proceeds to the parties entitled thereto, a creditor of the decedent becomes the purchaser of any of the decedent's real property, the surrogate may, upon his application, direct the amount of his claim to be allowed, in the first instance, upon the purchase price; and such purchaser shall only be required to pay the balance at the time of the sale. But, in case the proceeds of the decedent's real property shall be insufficient to satisfy the cost and expenses of administration and the debts and funeral expenses of the decedent, the purchasing creditor shall be allowed and credited, upon the judicial settlement of the accounts of the executor or administrator, only the amount he may be entitled to receive upon his claim and shall then pay the difference between the amount originally allowed and the amount he is entitled to receive. In case any purchaser has credit on his bid, as aforesaid, no deed shall be delivered to him until the judicial settlement of the accounts of the executor or administrator nor until he shall have paid the entire amount required under the provisions of this section.

Former § 2764.

§ 2712, Code Civ. Pro.

Compelling performance of contract, or granting relief therefrom.

The purchaser from the representative is not a party to the proceeding in Surrogate's Court and if he refuses to complete his purchase of the property he cannot be compelled by the surrogate so to do. The only course open to the person making the sale in such event would be either to abandon it and cause a resale or to bring an action in a court of general jurisdiction to compel a specific performance of the contract.

On the other hand if the representative making such sale refuses to complete it, he could be punished by the surrogate for contempt; or the purchaser could bring his action in the proper court to enforce like performance of the bargain and to recover his damages for the breach thereof.

If, however, the purchaser submits himself to the jurisdiction of the Surrogate's Court, the court may under this section make any order or grant any relief that the circumstances require.

Who should not be allowed to purchase.

Former section 2774 prohibiting certain persons from purchasing on the sale has been repealed, and the right to purchase is now governed by the general rules applicable to persons deal-

ing with trust estates. Under the former section it was held that neither an executor nor administrator could become the purchaser, either directly or indirectly. *Forbes v. Halsey*, 26 N. Y. 53; *Terwilliger v. Brown*, 44 id. 237.

Execution of order not affected by death, et cetera.

The death, removal, or disqualification, before the complete execution of the order, of all the executors or administrators does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as his predecessors might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes.

§ 2710, Code Civ. Pro.

Former section 2760 with "a decree" changed to "the order."

This section is to the same effect as section 766, Code Civ. Pro., which provides that a special proceeding brought by a public officer or trustee may be continued by his successor. See § 1828, Code Civ. Pro.

¶ 254 Report of Proceedings and Account; Decree on Judicial Settlement.

Execution of the order; decree of judicial settlement; conveyance to heirs.

When the order has been fully executed, the executor or administrator shall file, on or before the adjourned day of the judicial settlement, a supplemental account setting forth his proceedings under the order, the amount of the proceeds of the sale, and his expenses incurred thereunder. The surrogate shall thereupon continue and complete such judicial settlement and make such a disposition of the funds in the hands of the executor or administrator as justice shall require.

Where it is not necessary or advantageous to mortgage, lease or sell the real property of the deceased or of the estate, the parties interested may prove upon any such judicial settlement who are the real and true owners of any property devised by said will, or who are the only heirs-at-law of said deceased and entitled to succeed to his real estate, and thereupon such decree of judicial settlement may establish the rights and interests of the said parties and direct a conveyance to them by such executor or administrator according to their respective rights, in confirmation of their title thereto.

§ 2711, Code Civ. Pro.

Effect of revision. New section.

Having the proceeds of the disposition of the real estate before it, and the account and proceeds of the personal estate, the court makes a decree of judicial settlement embracing the proceeds of both classes of property, as the rights of all the parties require.

Additional authority is given by this section to determine who are the heirs-at-law, or the devisees, and to fix by the decree their shares or interests in any property not necessary to be sold, or in the surplus of property sold. All the parties having knowledge of the family are before the court or can be examined and on such an occasion it is the best time to determine questions of heirship, before the evidence is lost by lapse of time.

Where the parties desire it, the representative may be authorized to execute a deed in confirmation of title to those persons who are declared by the decree to be entitled to the real estate. If this authority is invoked it will serve to settle many titles which under the former practice were vague and uncertain, due to there being no reliable evidence of the family history.

Decree of judicial settlement will allow debts and direct payment.

When any claims objected to have been tried, or where all claims are allowed by the representative without objection, the surrogate shall include in his decree the allowance of such claims and direct their payment.

If there is any personal estate applicable to such payment it shall be directed to be applied, and the balance of the claims paid from the proceeds of the real estate.

Priority of judgments. See ¶ 228.

Where the real property sold was acquired after all the judgments were docketed against deceased, it was held that the judgment first docketed acquired no preference. *Matter of Hazard*, 73 Hun, 22, 56 N. Y. St. Repr. 82, 25 N. Y. Supp. 928; aff'd, 141 N. Y. 586.

A judgment against the estate of a deceased executor for his misappropriation of funds has no preference over the other debts

of the deceased executor on a distribution of the proceeds of the sale of real estate to pay debts, and costs included in such judgment are not payable from such fund. *Matter of Estate of Fox*, 92 N. Y. 93.

Priority of lien where action has been brought to collect debt from heir or devisee. See ¶ 259.

Consult section 1845, Code Civ. Pro., for a regulation of the rights of the parties where an action has been brought to collect a debt from an heir or devisee, and the same or other property is being disposed of in Surrogate's Court.

Judgment for costs not considered as a debt.

A judgment for costs granted in a suit begun in the lifetime of deceased and continued after his death by his executor is not a debt of deceased for the payment of which real estate may be sold. *Matter of Foley*, 39 App. Div. 248, 57 N. Y. Supp. 131.

Costs against representatives on contest over widow's dower are not debts payable from real estate. *Matter of Wilcox*, 11 Civ. Pro. 115.

Under the new section (2703) where the costs are properly a part of the expenses of administration, having been incurred in an attempt to recover or preserve assets of the estate, they should be allowed from the proceeds of sale after having been submitted to and allowed by the surrogate as necessary expenses of administration.

Costs on contested probate.

Where costs have been allowed to the executor after an unsuccessful effort to probate a will under section 2746, either the whole or such part thereof as the surrogate allows as proper expenses of administration should be paid from the proceeds of real estate.

Costs as part of a judgment.

Where judgment has been obtained against a surviving partner, costs are not part of the debt to be paid by the real estate of the deceased partner. *Matter of Stowell*, 15 Misc. Rep. 533, 74 N. Y. St. Repr. 296, 37 N. Y. Supp. 1127.

Costs included in a judgment are not preferred in payment, but are to be treated as part of the judgment. *Shute v. Shute*, 5 Dem. 1.

Allowances of expenses of administration from proceeds.

The section now allows the proper and necessary expenses of administration to be paid from the proceeds of real estate. Whether such expenses should or should not be allowed under the former practice was always a much contested question, but was finally decided against their allowance in *Matter of Hatch*, 182 N. Y. 320. After that case arose, the amendments of 1904 changed in some respects the character of the proceeding, making it necessary to have an acting executor or administrator to make the mortgage lease or sale and to dispose of the proceeds. Under that condition the surrogate of Kings county in *Matter of Liscomb*, 60 Misc. Rep. 647, 113 N. Y. Supp. 941, established the rule in that county that the proper and necessary expenses of administration are payable from the fund. His argument proceeds along the line that as the new practice requires the sale to be made by a representative in office all expenses of placing and retaining him in a position to exercise the power of sale are incidents to that power and are payable from the proceeds of its exercise.

The revision of 1914 adopts that view, and provides for the payment of such expenses in section 2703.

Where sale is made for the purpose of distribution.

Section 2703 subdivision 6 and section 2707 provide that a sale may be had for the purpose of distribution where any of the persons interested in such property is an infant, a proven or adjudged incompetent, an absentee or is unknown, and that when a sale for that purpose is directed, the order shall fix the rights of the parties, and provide for the proper protection thereof.

Many cases arise in which this provision will be of great advantage to the parties, not only in procuring a title, but in enabling them to realize upon a parcel of land left them, at practically no expense.

Often a person dies intestate owning a vacant lot, a small house, or other parcel of land of little value, and perhaps mortgaged. Such person often leaves an infant, incompetent, or absent heir-at-law, and the result may be that there is no one to take possession of and care for the property, or that a sale cannot be made without great expense.

Where such a condition exists, the application for such sale may be made to the Surrogate's Court on judicial settlement, and evidence of the facts taken, the rights and interests of the parties interested determined, and an order made for a sale.

The decree may then provide for the payment of the proceeds to the respective parties, or for a deposit of the same in court where such payment cannot be made.

Distribution of the surplus to the heirs or devisees entitled thereto.

Where after satisfying all the charges against the real property, there remains a surplus, the decree should direct its payment to the persons entitled thereto as heirs or devisees.

It may happen also that a fund directed to be paid into court, may not be necessarily applied to the payment of any debts or charges, in which case it should also be directed to be paid to the persons entitled thereto.

No special proceeding is now necessary, as heretofore to accomplish this result, but the decree of judicial settlement will entirely settle the estate by directing payment of all the funds before it as justice shall require.

Distribution of surplus; aliens. See ¶ 318.

Under our treaty with Prussia all citizens of that country have a reasonable time within which to sell any land which would have descended to them except for alienage, and to withdraw the proceeds, and so in a proper case they may be awarded their shares of the surplus from the sale of real estate. *Matter of Beck*, 31 N. Y. St. Repr. 965, 11 N. Y. Supp. 199.

No limitation of time on the right of heirs or devisees to obtain payment of surplus remaining.

In *Matter of Knapp* (25 Misc. Rep. 133, 54 N. Y. Supp. 927), application was made by the heir for distribution about nine years after letters were issued. A creditor appeared, but it was held that the Statute of Limitations had run against his debt. It was said, however, that he could have brought a proceeding for distribution *at any time* before the bar of the statute had become complete.

In *Felt v. Martin* (20 App. Div. 60, 46 N. Y. Supp. 741), the court referred to the fact that the three years in which petition could be made had not expired.

In *Dunning v. Bank* (61 N. Y. 506), it was said: "The terms of the statute show that the surplus is regarded as real estate. The most careful precautions are taken to prevent the heirs from being deprived of it, except in the same manner and to the same extent that would be permitted in case the land had remained unsold."

Liens upon shares of interested parties.

A judgment against an heir is not a lien upon the proceeds of sale, unless docketed in the county before sale of the property. *Gram v. Green*, 4 Redf. 357.

Appeal.

A creditor may accept his share under the decree and appeal for the purpose of reducing the amount of expenses allowed. *Higbie v. Westlake*, 14 N. Y. 281.

¶ 255 Decree Should Provide for Retention of Funds to Pay Any Claim Not Adjusted; and for Expenses and Commissions to Representative.

Provision for payment of undetermined claims and debts not yet due.

If any claim remains undetermined at the making of the decree, or any debt is not yet due and the party holding the same does not consent to its present payment, the decree shall direct that sufficient funds be retained by the executor or administrator to meet any such claim or demand when deter-

mined, or when payable, and provide for the distribution of any surplus of the amount so retained.

§ 2713, Code Civ. Pro.

Effect of revision. New section.

New section, combining part of former section 2751 which has been repealed.

Expenses and commissions of the representative.

Upon the disposition of real property of a decedent, as prescribed in this chapter, the executor or administrator disposing of the property, must be allowed by the surrogate out of the proceeds of the sale brought into court, his commissions and expenses; and such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein.

§ 2749, Code Civ. Pro.

Effect of revision. § 2563 amended.

Section 2564 is repealed.

General section on commissions governs as to the amount. (§ 2753, ¶ 135.)

The *per diem* allowance for services is taken out of this section as the services rendered by the representative will be paid for by his commissions as in other cases.

Allowance of expenses for attorney will be governed by the wise discretion of the surrogate.

¶ 256 Effect of Conveyance; Presumption of Regularity; Restitution from Assets Subsequently Discovered.

When conveyance not to affect purchaser or mortgagee from heir, etc.

A conveyance of real property, made pursuant to this title, does not affect, in any way, the title of a purchaser or mortgagee, in good faith and for value, from an heir or devisee of the decedent, unless letters testamentary or letters of administration, upon the estate of the decedent, were granted, by a surrogate's court having jurisdiction to grant them, upon a petition therefor, presented within two years after his death.

§ 2714, Code Civ. Pro.

Effect of revision. § 2777 amended.

Time limit in the last line changed from four to two years.

Effect of sale or mortgage by heir or devisee. See ¶ 259.

A sale carries the title of the decedent unaffected by the acts of heirs or devisees. *Cunningham v. Parker*, 146 N. Y. 29.

If a mortgage be taken within the three years there is no legal presumption that simple contract debts of testator have been paid. *Cunningham v. Whitford*, 74 Hun, 273, 56 N. Y. St. Repr. 285, 26 N. Y. Supp. 575. See same case on later appeal 146 N. Y. 29.

Effect of conveyance of decedent's interest under contract.

A conveyance of the decedent's interest in all the real property, held by him under a contract for the purchase thereof, operates as an assignment of the contract to the purchaser; and vests in him, his heirs and assigns, all the right, title and interest of all the persons entitled, at the time of the sale, in and to the decedent's interest in the real property.

A conveyance of the decedent's interest in a part only of the real property, held under such a contract, transfers to the purchaser all the decedent's right, title and interest in and to the part so sold; and all rights, which would be acquired thereto, by the executor or administrator, or by any person entitled, at the time of the sale, to the interest of the decedent therein, by perfecting the title to the property contracted for, pursuant to the contract. Upon fully complying with the contract, the purchaser has the same right to enforce performance thereof, with respect to the part conveyed to him; and the executor or administrator, or his assignee, has the same right to enforce performance, with respect to the residue, as the decedent would have had, if he were living. Any title acquired by the executor or administrator, or his assignee, with respect to the part not sold, must be held in trust for the use of the persons entitled to the decedents' interest; subject to the dower of the widow, if any.

§ 2715, Code Civ. Pro.

Former sections 2782, 2783 consolidated.

Contracts for the purchase or sale of lands and the rights of the heirs or devisees, and of the representative thereunder, representing the creditors and next of kin are fully treated of in paragraphs 205, 206, 412.

Presumption where records have been removed.

Where the records of the surrogate's court have been heretofore, or are hereafter removed from one place to another, in either the same or another county or the records of such proceeding have been lost or destroyed and twenty-five years have elapsed after a sale or other disposition of real prop-

erty, or of an interest in real property, as prescribed in this title, the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary.

§ 2716, Code Civ. Pro.

Effect of revision. § 2785 amended.

The only change consists in including cases where the records have been lost or destroyed.

Effect of the section.

The absence from the surrogate's records of an order confirming a contract of sale and directing a conveyance — *held* not to invalidate the sale. *Mott v. Ft. Edward W. W. Co.*, 79 App. Div. 179, 79 N. Y. Supp. 1100.

This section does not affect the rights of persons not parties to the proceeding, *i. e.*, remaindermen who might take the property at the death of a life tenant. *Wilson v. White*, 109 N. Y. 59; *rev'g*, 39 Hun, 656.

Restitution from assets subsequently discovered.

Where a decree has been made for the application of the proceeds of real property as prescribed in this title, and assets, which should have been applied thereto, are afterward discovered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterward comes to the hands of the executor, administrator, legatee or next of kin, the heir, devisee, or other person aggrieved may maintain an action to procure reimbursement therefrom.

§ 2718, Code Civ. Pro.

Former section 2801 not materially changed.

CHAPTER XLII

Actions by Creditors against Surviving Husband or Widow, Next of Kin, Legatees, Heirs and Devisees to Recover Unpaid Debts. Action to Impeach a Sale.

- ¶ 257. § 1837. Action to recover debts against those who take personal property.
- ¶ 258. § 1838. Action may be joint or several.
- § 1839. Recovery apportioned.
- § 1841. Requisites to recover.
- ¶ 259. § 101 (D. E.). Against heirs and devisees.
- ¶ 260. § 1848. Requisites to recovery against heirs.
- ¶ 261. § 1855. Debts which may be enforced.
- ¶ 262. § 7 (P. P.). Action to impeach a sale.

¶ 257 Actions to Recover Debts Against Surviving Husband or Widow, Next of Kin, Legatees, Heirs, and Devisees.

Because a creditor does not present his claim to the representative and enforce collection of it from the personal property, he does not thereby lose his right to enforce payment of his claim.

The personal property is the primary fund for the payment of all debts and it is the proper practice to present claims to the representative and receive payment from him. If, however, there is no personal property or the creditor has failed to properly present his claim, so that he does not receive payment from the personal estate, he may bring his action against the widow, next of kin, or legatees to recover it from the personal estate distributed to them, or he may bring his action against the heir or devisee who has received real property descended or devised to him.

Any one of these parties is liable to pay valid debts of the deceased to the extent of the personal or real property received by him from the deceased debtor. In granting the judgment the court must be governed by the same preferences which are made

in section 2682, Code Civ. Pro., as to payment of debts by the representative from the personal estate.

The Code provisions relating to these actions are from sections 1837 to 1860.

¶ 258 When Action Lies Against Next of Kin, Legatees, etc.

An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

§ 1837, Code Civ. Pro.

Where the deceased left an estate, effort should be made to collect the funeral charges from such fund before resorting to individual liability. *Huhna v. Theller*, 35 Misc. Rep. 296, 71 N. Y. Supp. 752.

What allegations sufficient in action to reach surplus on foreclosure to pay debts. *Coe v. Cobb*, 50 App. Div. 80, 63 N. Y. Supp. 439.

No preliminary accounting is necessary before beginning action. The Supreme and Surrogate's Court have concurrent jurisdiction to cause an accounting. *Miller v. Morton*, 89 Hun, 574, 69 N. Y. St. Repr. 648, 35 N. Y. Supp. 294.

Where money has been borrowed by the representative to pay outlawed claims at the request of the persons interested, a recovery by the lender may be had against such persons. *Hamlin v. Smith*, 72 App. Div. 601, 76 N. Y. Supp. 258.

Action may be joint or several.

An action specified in the last section, must be brought, either jointly against the surviving husband or wife, and all the legatees, or all the next of kin, as the case may be, or, at the plaintiff's election, against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee, within the meaning of each provision of this article, relating to legatees.

§ 1838, Code Civ. Pro.

Where one person takes the entire residuary estate which is sufficient to pay the debt without apportionment, action may be maintained directly against such residuary legatee. *Mertens v. Roche*, 39 App. Div. 398, 57 N. Y. Supp. 349.

In joint action, recovery to be apportioned.

Where a joint action is brought, as prescribed in the last section, the whole sum, which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award, against each defendant separately, the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expenses of serving the summons upon each defendant must be taxed against him only; and one sheriff's fee, for returning an execution, may be taxed against each defendant, against whom any sum is awarded.

§ 1839, Code Civ. Pro.

Liability apportioned among several persons who had received assets. *Miller v. Morton*, 89 Hun, 574, 69 N. Y. St. Repr. 648, 35 N. Y. Supp. 294.

Recovery in a several action.

Where an action is brought against the surviving husband or wife only, or against one only of the next of kin, or legatees, the sum, which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant in an action brought, as prescribed in the last section.

§ 1840, Code Civ. Pro.

Requisites to recovery in action against legatee.

If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either:

1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or,
2. That the value of assets, so delivered, has been recovered by some other creditor; or,
3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case he can recover only for the deficiency.

§ 1841, Code Civ. Pro.

Co-legatees in no sense sustain to each other the relation of surety in respect to the testator's debts, each being liable only in

proportion to the amount of his legacy. *Wilkes v. Harper*, 1 N. Y. 586.

Where the claim was presented to the executor or administrator and rejected and not sued upon, no claim could be made against legatees and distributees, under the former practice. *Selover v. Coe*, 63 N. Y. 438.

But under the present practice a claim must be tried and disposed of, either upon the creditor's election to bring an action in another court within three months from the date of rejection, or upon his failing to do this, upon the judicial settlement. (See ¶ 223.) There is now no short statute of limitations under which a creditor loses his remedy for the collection of his claim.

Requisites to recovery; in action against a preferred legatee.

Where some of the legatees are preferred to others, an action may be maintained, as prescribed in the last five sections, against one or all of those who are equally preferred, or equally deferred, as if the legatees of that class were all the legatees. But where it is brought against a preferred legatee, or a class of preferred legatees, the plaintiff must show, in addition to the matters, with respect to the next of kin, required by the provisions of the last section, the same matters, with respect to each legatee, or class of legatees, to whom the defendant or defendants are preferred.

§ 1842, Code Civ. Pro.

¶ 259 Action to Recover Debts Against Heirs and Devisees.

The heirs of an intestate and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by the decedent.

§ 101, Decedent Estate Law.

When action therefor may be brought.

But an action to enforce the liability declared in section 101 of the Decedent Estate Law, cannot be maintained, except in one of the following cases:

1. Where three years have elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the state.

2. Where three years have elapsed, since letters testamentary, or letters of administration, upon his estate, were granted, within the state.

§ 1844, Code Civ. Pro.

Effect of revision of proceeding relating to the sale of real estate for payment of debts upon these sections.

On account of the failure of passage of several separate bills introduced by the revision committee amending sections not included in chapter XVIII, the foregoing section 1844 is not consistent with the existing laws relating to the sale of real estate for the payment of debts. (§ 2701 to § 2718.) This section does not give a right of action until the expiration of three years after the issue of letters, because under the former law, the proceeding to sell in Surrogate's Court could be brought at any time within three years. Now no decree or order of sale can be made unless the creditor procures the commencement of a proceeding for judicial settlement within eighteen months. (§ 2702, ¶ 245.)

As the law now stands the remedy by action is postponed for three years, which is not a serious matter, but probably the section will be amended by the next legislature making the time in which an action can be brought less than three years.

The policy of the Code of Civil Procedure is to give opportunity, where the administration of an estate is promptly proceeded with, for the parties interested to invoke the general and less expensive remedy of the sale of real estate (§ 2702), and the special remedy against the heir and devisee is suspended during three years from the testator's death for that purpose.

If this opportunity is allowed to pass unimproved and a cause of action arises against the heir or devisee by lapse of time, the subsequent granting of letters will not have the effect to further suspend the action against the heir or devisee for three years from their issue.

Not against heirs of heirs.

The cause of action created by section 101 Decedent Estate Law (formerly § 1843 of the Code of Civil Procedure) against the heirs or devisees to recover an indebtedness existing against the person from whom they acquired the property can only be maintained against the direct heirs and devisees, and cannot be

maintained against the heirs or devisees of such heirs or devisees. *Rogers v. Patterson*, 79 Hun, 483, 29 N. Y. Supp. 963; aff'd, 150 N. Y. 560, 44 N. E. 1128; *Green v. Dunlop*, 136 App. Div. 116, 120 N. Y. Supp. 583.

Rights of subsequent mortgagees and purchasers. See ¶ 256.

There are two modes of reaching, for the payment of general debts, the real property devised, or descended to the heirs-at-law, differing in the form and character of the proceeding and also in the scope of the ultimate relief.

Within eighteen months from the grant of letters, the creditor must enforce his right to have a judicial settlement instituted, in which proceeding he may have a mortgage lease or sale to pay his debt. (§ 2702, ¶ 245.)

Such a sale carries the title of the descendants, unaffected by the acts of heirs or devisees, except that where no letters have been issued within two years after the death of the testator or intestate a purchaser or mortgagee from an heir or devisee in good faith and for value is protected. § 2714, Code Civ. Pro., ¶ 256.

Where three years have been allowed to elapse proceedings should be taken under section 1844, Code Civ. Pro., and when so taken the resulting sale has a greater respect for the rights of those claiming under the heir or devisee than is given by the proceeding within three years before the surrogate. If the land has not been aliened the debt may be collected out of it, and the judgment as a lien has priority over a judgment against the heir or devisee for his individual debt or demand (§ 1852, Code Civ. Pro.), but the right of a purchaser in good faith and for value is explicitly saved and protected, although he claims under the heir or devisee (§ 1853, Code Civ. Pro.). *Cunningham v. Parker*, 146 N. Y. 29.

If a sale is had under section 2702, etc., within three years to pay debts a subsequent mortgagee or purchaser obtains no superior rights to creditors (¶ 256, § 2714, Code Civ. Pro.).

But if a sale be not had in such proceedings but resort is had after the lapse of such three years to an action against the heirs or devisees a subsequent mortgagee or purchaser is protected under § 1853, Code Civ. Pro. *Cunningham v. Parker*, 146 N. Y. 29; *Heidgerd v. Cunningham*, 135 App. Div. 414, 119 N. Y. Supp. 921.

Continued reference to "three years" is made because as the law now stands, on account of the failure of the legislature of 1914 to pass the amendments suggested by the revision committee, the creditor has three years in which to bring his action under these sections. That, however, is of little practical consequence because, if a claim is presented, it will, or can be disposed of by trial on judicial settlement at the end of a year at the latest, and the real estate must be applied to payment when necessary.

No action can be brought against heirs until after three years have elapsed from the time of granting letters. *Selover v. Coe*, 63 N. Y. 438.

Land situate in Pennsylvania devised to persons here and sold by them. Action by creditor to reach that fund — *held*, could not be maintained. *Deyo v. Morss*, 30 App. Div. 56, 51 N. Y. Supp. 785.

Statute of limitations.

An action brought under this section to recover upon a note or simple debt is deemed an action upon such note or debt and the six years' Statute of Limitations applies. *Adams v. Fassett* (149 N. Y. 61.) This case seems to overrule *Mortimer v. Chambers* (63 Hun, 335), 17 N. Y. Supp. 874, 43 N. Y. St. Repr. 365, where the ten-year statute was held to apply.

The effect of this section read with section 406, Code Civ. Pro., is to prevent the bar of the statute before the expiration of nine years from the time it began to run. *Adams v. Fassett*, 149 N. Y. 61; *aff'g*, 73 Hun, 430, 56 N. Y. St. Repr. 31, 26 N. Y. Supp. 447.

When letters are not issued within three years from the death, the subsequent issue of letters does not compel the creditor to wait until three years after such issue. *Adams v. Fassett*, 149 N. Y. 61, 56 N. Y. St. Repr. 31, 26 N. Y. Supp. 447.

In section 1844, subdivision 1, of the Code of Civil Procedure we have a statute that in positive terms prohibits a creditor from commencing his action against the heir or devisee until three years have elapsed since the death of the decedent. Turning to section 406 of the Code of Civil Procedure, which is found in the title containing general provisions relating to the chapter on limitations of the time of enforcing a civil remedy, we find this provision:

“Where the commencement of an action has been stayed by injunction, or order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time, limited for the commencement of the action.”

The provision of section 1844, subdivision 1, is a statutory prohibition, under section 406, for a period of three years, and this time must be added to the six years of the statute, thus giving the plaintiff nine years in which to begin his action. *Adams v. Fassett*, 149 N. Y. 61; aff'g, 73 Hun, 430, 56 N. Y. St. Repr. 31, 26 N. Y. Supp. 447.

The period of nine years does not run from the death of decedent, but from the date when the cause of action accrues, or from the last payment. *Hill v. Moore*, 131 App. Div. 365, 115 N. Y. Supp. 289; aff'd, 198 N. Y. 633.

Statute of limitations. Ten years.

The ten year statute applies in an action against a devisee founded upon the stockholders liability of the decedent. *Richards v. Gill*, 138 App. Div. 75, 122 N. Y. Supp. 620.

Effect of application to sell real property under section 2702.

Where it appears that, at the time of the commencement of such an action, a petition, seasonably presented as prescribed by law, praying for a decree to dispose of real property of the decedent for the payment of his debts, was pending in a surrogate's court having jurisdiction, the proceedings in

the action, subsequent to the complaint, must be stayed by the court, until the petition is disposed of, unless the plaintiff elects to discontinue. If a decree to dispose of real property, pursuant to the prayer of the petition, is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the decree; and the judgment in the action does not charge, or in any way affect, that property.

§ 1845, Code Civ. Pro.

This section is inconsistent with the existing law, but there will be no difficulty in applying it in its substance to the changed procedure.

¶ 260 *Idem*; Requisites to Recovery Against Heirs.

Where the action is brought against heirs, the plaintiff must show, either:

1. That the decedent's assets, if any, within the state, were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class; or

2. That the plaintiff has been unable, or will be unable, with due diligence, to collect his debt, by proceedings in the proper surrogate's court, and by action against the executor or administrator, and against the surviving husband or wife, legatees, or next of kin.

The executor's or administrator's account as rendered to, and settled by, the surrogate, may be used as presumptive evidence of any of the facts, required to be shown by this section.

§ 1848, Code Civ. Pro.

Requisites to recovery against devisees.

Where the action is brought against devisees, the plaintiff must show, in addition to the matters specified in the last section, either that the real property of the decedent, which descended to his heirs, was not sufficient to pay the plaintiff's debt, or that the plaintiff has been unable, or will be unable, with due diligence, to collect his debt by an action against the heirs.

§ 1849, Code Civ. Pro.

The relief to be had is that the execution be satisfied out of the real estate remaining in the devisee or heir. *Lawrence v. Grout*, 112 App. Div. 241, 98 N. Y. Supp. 279.

Mere statements annexed to an account are not presumptive evidence of the facts therein contained — so *held* as to schedule of debts presented but not allowed and paid by the executor. *Read v. Patterson*, 134 N. Y. 128; aff'g, 55 Hun, 608.

Proof required.

Section 1848, Code Civ. Pro., prescribes that an executor's or administrator's account as rendered to, and settled by, the surrogate may be used as presumptive evidence of lack of assets and inability to collect.

An intermediate account which has not been settled by decree, is not sufficient proof under this section. The mere obtaining of a judgment against the representative is not sufficient to show that the debts can not be collected from the estate. *Lawrence v. Grout*, 112 App. Div. 241, 98 N. Y. Supp. 279.

Tax liens and dower to be deducted. See ¶ 227.

"I have deducted the taxes for the reason that they were a lien on the land, and enforceable against the land only, as is the case with all land taxes in the city of New York. Section 2719 (now § 2682), Code Civ. Pro., prescribes the order in which the debts of decedents must be paid, making 'Taxes assessed on the property of the deceased previous to his death,' payable second. This section in terms applies only to debts of decedents, and, therefore, only refers to taxes which are such debts, and collectible by distraint of the debtor's chattels by the tax collector, or by other proceedings against him, and which are, therefore, valid claims against the executor or administrator. Under the general tax laws of the State, taxes are not levied on the land, but only assessed against the owner personally, except in the case of nonresident lands; and the said Code provision embraces only the former, they being personal debts. Taxes levied on the land and not assessed against the owner are in the same category on the question being decided as local assessments on the land, which was the case presented in *Matter of Hun* (144 N. Y. 472).

"The defendant, having aliened the land devised to her, is liable to the creditors of her testator to the extent of the value of such land over the liens thereon at the time of the testator's death, and they may take judgments against her instead of against the land to that amount, each creditor being entitled to a judgment for his proportionate share, such value being less than the aggregate of debts. § 1854 *et seq.*, Code Civ. Pro.

"But the defendant's dower interest must be ascertained and deducted from the value of the land in ascertaining the value for which she is liable. The devise to her of all of the real estate in fee was not in terms in lieu of dower, and did not put her to her election. It is not repugnant to her right of dower." *Lewis v. Smith*, 9 N. Y. 502; *Lauby v. Gill*, 42 Misc. Rep. 334, 86 N. Y. Supp. 718.

Counterclaim.

Since the action is against the defendants jointly one of them cannot set up a counterclaim affecting his interests only. *Mortimer v. Chambers*, 63 Hun, 335, 43 N. Y. St. Rep. 365, 17 N. Y. Supp. 874.

¶ 261 Classification of Debts to be Enforced Under This Article; Lien of Judgment.

Where the surviving husband or wife, next of kin, legatees, heirs, or devisees, are liable for demands against the decedent, as prescribed in this article or section 101 of the decedent estate law they must give preference in the payment thereof, and they are so liable therefor, in the order prescribed by law, for the payment of debts by an executor or administrator. Preference of payment cannot be given to a demand, over another of the same class, except where a similar preference by an executor or administrator is allowed by law. The commencement of an action, under any provision of this article, or section 101 of the decedent estate law does not entitle the plaintiff's demand to preference over another of the same class, except as otherwise specially prescribed by law.

§ 1855, Code Civ. Pro.

This article not applicable, where will charges real property, etc.

The preceding section and article two of title three of chapter 15 of the code of civil procedure do not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon

the real property descended or devised or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

§ 102, Decedent Estate Law.

Judgment; when to be satisfied out of land.

If it appears that any of the real property, which descended or was devised to a defendant had not been aliened by him at the time of the commencement of the action, the final judgment must direct that the debt of the plaintiff, or the proportion thereof which he is entitled to recover against that defendant, be collected out of that real property. Such a judgment is preferred as a lien upon that property, to a judgment obtained against the defendant, for his individual debt or demand.

§ 1852, Code Civ. Pro.

Sale of undetermined share in an estate to collect debt from nonresident next of kin.

An attachment having been issued, an action was brought by the sheriff in aid of the attachment—*held*, that the judgment and interest in the estate might be sold under the original execution. *Arkenburgh v. Arkenburgh*, 114 App. Div. 436, 99 N. Y. Supp. 1127.

Attachment.

An action to declare a debt of the deceased to be a lien upon the real estate descending from such person is not one in which an attachment might issue under the provisions of section 635 of the Code of Civil Procedure. The action is not to enforce but to acquire a lien upon the real property which descended to the defendant and to authorize its sale for the purpose of satisfying the debt. (*Rogers v. Patterson*, 79 Hun, 483, 29 N. Y. Supp. 963, 61 N. Y. St. Repr. 298; *aff'd*, 150 N. Y. 560.) It is an action in equity having the nature of a proceeding in rem . . . in such sense that when the land has not been aliened by the heir, the judgment must direct that the debt of the plaintiff be collected out of the real property. (Code Civ. Pro., § 1852; *Hauseit v. Patterson*, 124 N. Y. 356.)

In *Wood v. Wood* (26 Barb. 356), where the same relief was sought, the court said: "The basis of the action is the debt

which Jacob Wood, deceased, owed the plaintiff; but that is not the gist of it. It is not an action for the recovery of money only, although the ultimate object of it is to obtain money * * *; but it is an equitable action to reach certain real estate which Jacob Wood, deceased, devised to the defendants, and to authorize its sale for the purpose of satisfying a debt that the deceased owed the plaintiff. *Avery v. Avery*, 119 App. Div. 698, 104 N. Y. Supp. 290.

Proceeds of property taken by condemnation.

Land having been sold under the right of eminent domain, judgment should be against the devisees allowing to them such equities as they might have had if the land had not been taken. *Lawrence v. Grout*, 140 App. Div. 629, 125 N. Y. Supp. 982.

When action barred by judgment against heir, etc.

A final judgment against an heir or devisee, bars an action against the executor or administrator of the decedent, for the same cause, and every other remedy to enforce payment thereof out of the decedent's property; unless an execution against property, issued upon the judgment, has been returned wholly or partly unsatisfied, or sufficient real property to satisfy the judgment has not descended, or been devised to the judgment debtor. But, if the judgment was recovered for a debt or legacy, expressly charged upon the estate descended or devised, the bar is absolute.

§ 1821, Code Civ. Pro.

¶ 262 The Representative May Impeach a Sale Made by Deceased, and if He Fails to do so, a Creditor May Bring Such Action. Action to Impeach a Sale Made by the Representative.

Section 19 of the Personal Property Law provides that a representative may impeach a sale made by the deceased, and if he fails to do so, a creditor may bring such action.

An executor, administrator, receiver, assignee, or trustee, may, for the benefit of creditors or others interested in personal property, held in trust, disaffirm, treat as void, and resist any act done, or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate, or property, and a person who fraudulently receives, takes, or in any manner interferes with the personal property of a deceased person, or an

insolvent corporation, association, partnership, or individual is liable to such executor, administrator, receiver, or trustee for the same or the value thereof and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor having a claim against the estate of such debtor, exceeding in amount the sum of \$100, may without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in said estate, disaffirm, treat as void, and resist any act done or conveyance, transfer, or agreement made in fraud of creditors or maintain an action to set aside such act, conveyance, transfer, or agreement. Such claim, if disputed, may be established in such action. The judgment in such action may provide for the sale of the property involved, when a conveyance or transfer thereof is set aside and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law.

§ 19, Personal Property Law.

Where an estate is insolvent it is the duty of an executor or administrator to impeach a sale of personal property made by the deceased with the intent to defraud creditors and recover the same from the fraudulent vendee. *Bate v. Graham*, 11 N. Y. 237.

Impeaching sale made by representative. See ¶ 399.

The court in construing this statute held in *Magoun v. Quigley* (115 App. Div. 226, 100 N. Y. Supp. 1037), that this statute only authorizes an action to set aside a transfer made by the insolvent debtor, and does not furnish authority for bringing an action to set aside an alleged fraudulent transfer made by the representative of the decedent.

In *Agne v. Schwab* (123 App. Div. 746, 108 N. Y. Supp. 487), the *Magoun* case (*supra*), so far as it held that no action could be brought to impeach a sale made by the representative, was not followed, the court saying that the right to maintain an action to impeach a fraudulent sale made by any representatives did not depend upon statute and had always been allowed independently of any statute law. That as a person has no right of action to set aside his own fraudulent conveyances, no such right could pass from him to his executor, assignee, etc., and hence a statute was necessary to give the latter the right to bring such an action.

CHAPTER XLIII

Legatees and Legacies Classified and Defined. Legacies and Devises, Who May Take, and the Quantity of the Estate. Powers and Uses.

- ¶ 263. Legatees and legacies classified and defined.
- ¶ 264. General legacies.
- ¶ 265. § 2673. Specific legacies.
- ¶ 266. Demonstrative legacies.
- ¶ 267. Ademption of legacies.
- ¶ 268. Abatement of legacies.
- ¶ 269. Legacy to creditor.
- ¶ 270. Legacy in furtherance of a secret trust or agreement.
- ¶ 271. Legacy by implication.
- ¶ 272. Bequests for funeral expenses, monuments and cemetery lots and masses.
- ¶ 273. § 113 (R. P.). Bequest and devise of real and personal property for charitable purposes.
- ¶ 274. Devises and bequests to corporations.
- ¶ 275. Devise or bequest to unincorporated society.
- ¶ 276. Devise or bequest of residuary estate.
- ¶ 277. § 66 (R. P.). Title of legatees or devisees.
- ¶ 278. Devise or bequest to a class.
- ¶ 278. Power of absolute disposition.
- ¶ 278. § 149 (R. P.). Remainder over in case of non-use.
- ¶ 279. § 150 (R. P.). Powers may create a fee.
- ¶ 279. § 41 (R. P.). Power of disposition by will.
- ¶ 280. Right to encroach on income.
- ¶ 280. Legacy destroyed in the using.

¶ 263 Legatees and Legacies Classified and Defined.

A LEGATEE is a person who takes personalty under a will. *Weeks v. Cornwell*, 104 N. Y. 341.

A GENERAL LEGACY is a gift of personal property by a last will and testament, not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind.

A **SPECIFIC LEGACY** is a bequest of a specified part of a testator's personal estate distinguished from all other of the same kind.

A **DEMONSTRATIVE LEGACY** is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security.

A **SUBSTITUTIONARY LEGACY** is one repeated in the same instrument.

AN **ACCUMULATIVE LEGACY** is one repeated in a will and codicil.

Distinctions illustrated.

For example, the bequest to an individual of the sum of \$1,500 is a general legacy. A bequest of the proceeds of a bond and mortgage, particularly describing it, is a specific legacy. A bequest of \$1,500, payable out of the proceeds of a specified bond and mortgage, is a demonstrative legacy.

A demonstrative legacy partakes of the nature of a general legacy by bequeathing a specified amount and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made, but differs from a specific legacy in the particular, that if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate. *Crawford v. McCarthy*, 159 N. Y. 518; rev'g, 21 App. Div. 484.

In determining whether a legacy is general or specific evidence of circumstances may be received which tends to explain the meaning of the language used. *Matter of Hastings*, 6 Dem. 307.

¶ 264 General Legacies.

Bequest of a certain amount of money "in government bonds" is a general legacy. *Matter of Newman*, 4 Dem. 65.

Where a testator gives two bequests of money to two sons and provides for their payment by another son against whom he holds a mortgage, such legacies are general and not specific and the

executor may maintain an action to foreclose the mortgage. *Newton v. Stanley*, 28 N. Y. 61.

I give to A. twenty-five shares of the stock of the M. G. Co., or the proceeds of the same, should the same have been sold, is a general legacy. *Osborne v. McAlpine*, 4 Redf. 1.

Bequests of stocks and bonds in unequal proportions to various legatees, so that such stocks and bonds cannot be set off to each in such proportions, constitute general legacies. *Matter of Fisher*, 93 App. Div. 186, 87 N. Y. Supp. 567.

Cases showing an intention to make a general pecuniary legacy and not a specific legacy of stocks or securities. *Dunning v. Dunning*, 82 Hun, 462, 64 N. Y. St. Repr. 397, 31 N. Y. Supp. 719; aff'd, 174 N. Y. 686; *Matter of Anderson*, 19 Misc. Rep. 210, 43 N. Y. Supp. 1146; *Matter of Hodgman*, 140 N. Y. 421; aff'g, 69 Hun, 484.

The courts, proceeding upon the presumption that the testator intends a real benefit to the legatee, are inclined to consider legacies general rather than specific where the language of the will admits of such construction. *Giddings v. Seward*, 16 N. Y. 365; *Matter of Howard*, 46 Misc. Rep. 204, 94 N. Y. Supp. 86.

¶ 265 Specific Legacies.

A specific legacy is a bequest of a specified part of a testator's personal estate distinguished from all other of the same kind. It may be distinguished by its description, or by describing its particular location. *Matter of Delaney*, 133 App. Div. 409, 117 N. Y. Supp. 838. In determining what particular property is intended the will should be considered in that respect as speaking from its date of execution, and not from date of death.

Debt due testator and bequeathed by will.

A discharge or bequest in a will of a debt or demand of the testator against an executor named therein or against any other person is not valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must be included in the inventory, and, if necessary be applied in the payment of his debts; and if

not necessary for that purpose must be paid in the same manner and proportion as other specific legacies.

From § 2673, Code Civ. Pro.

The gift of part of a debt due to testator is a specific legacy. *Davis v. Crandall*, 101 N. Y. 311.

Proceeds of sale of specific real estate.

The proceeds of a sale of specific property which is directed by the will to be sold, are just as much a specific legacy as if the property itself had been given. *Matter of Matthews*, 122 App. Div. 605; 107 N. Y. Supp. 301.

The definition applied.

A bequest of a mortgage held to carry the bond given with it. *Klock v. Stevens*, 20 Misc. Rep. 383, 45 N. Y. Supp. 603.

"Stock or government annuities, or shares in public companies, may be specially bequeathed, but in order to make a bequest specific, the intention that it should be so must be clear, otherwise the bequests will be general, and the word *my* preceding *stock*, *annuities*, or *shares*, is adjudged sufficient to render the legacy specific."

"But it seems to be settled that the mere possession by the testator at the date of the will, of stock, or annuities of equal or larger amount than the bequest, will not, without words of reference, or an intention appearing upon the will that he meant the additional stock to which he was possessed, make such bequest specific."

The testatrix bequeathed "my diamond brooch." At her death there was found among the assets of her estate an article which answered the description of the legacy, and it seems that under the authorities it is of no importance that the brooch, which was the only diamond brooch owned by the testatrix at the time of her death, was not the particular one owned by her at the time her will was made. *Waldo v. Hayes*, 96 App. Div. 454, 89 N. Y. Suppl. 69.

Legacy of "money" defined.

The definition of what constitutes "money" was laid down in this State by Chancellor Kent in *Mann v. Executors of Mann*, (1 Johns. Ch. 231; aff'd, *sub nom. Mann v. Mann*, 14 Johns. 1). He held as follows: "I do not perceive, from a perusal of the will, any reason for construing the word *moneys* beyond its popular and legal meaning. It means gold and silver, or the lawful circulating medium of the country. (Co. Litt. 207a.) It may be extended to bank notes, when they are known and approved of and used in the market as cash. Perhaps it would be proper to extend the term to money deposited in bank, for that is cash, and considered and used as cash placed there for safekeeping in preference to the chest of the owner. * * * Beyond these bounds the word cannot be extended, unless it be accompanied with explanations showing that the testator alluded to other property than his cash, and defining that property as money at interest on bond and mortgage, or money in the public funds. If he uses the word absolutely, without any such accompanying qualification or reference, it cannot be construed beyond its usual and legal signification, without destroying all certainty and precision in language, and involving the meaning of the will in great uncertainty * * *." From *Matter of Hendrickson*, 140 App. Div. 388, 125 N. Y. Supp. 309.

A gift of "all the money left in the W. S. Bank" is a specific legacy. The executor is not bound to invest such legacy and is not chargeable with interest for not investing the same. *Larkin v. Salmon*, 3 Dem. 270.

"I direct my daughter out of the moneys belonging to me on deposit in her name to pay my said son the sum of \$1,500" constitutes a specific legacy. *Crawford v. McCarthy*, 159 N. Y. 514; rev'g, 21 App. Div. 484, 47 N. Y. Supp. 436.

A gift of "all my deposit of money in the E. S. S. Bank" is a specific legacy, and if such bank is liquidated the legacy attaches to the same fund in another bank. *Matter of Howard*, 46 Misc. Rep. 204, 94 N. Y. Supp. 86.

Bequests of certain sums of money, "par value of certain capital stock," enumerating it, was, when other language of the will was considered, held to be specific legacies. *Cramer v. Cramer*, 35 Misc. Rep. 17, 71 N. Y. Supp. 60.

Gift of all moneys due and to become due on insurance policies is specific. *Matter of Tailor*, 147 App. Div. 741, 133 N. Y. Supp. 122; aff'd, 205 N. Y. 599.

Distinction between a demonstrative and specific legacy of money.

The distinction between a demonstrative and a specific legacy of money is lucid in theory but often confusing in application; the former is defined as a bequest of a certain sum payable from a particular fund; if such fund, however, is insufficient, the deficiency is made good from the general funds of the estate. *Crawford v. McCarthy*, 159 N. Y. 514; rev'g, 21 App. Div. 484, 47 N. Y. Supp. 436.

The peculiar characteristic of a specific legacy, however, is that if its subject-matter be destroyed, consumed, sold, exchanged, or in any manner disposed of, so that nothing remains in the estate to which the particular dispositive words are applicable at the death of the testator, then such legacy is adeemed. *Abernethy v. Catlin*, 2 Dem. 341.

While legacies of this class usually relate to other species of property, money may be the subject. A bequest "of a sum of money in a bag, or in a chest, or on deposit in a bank or in a trunk, or in a safe-deposit vault" at the time of the execution of the will is a specific bequest and subject to be adeemed by the subsequent act of the testator. *Lawson v. Stitch*, 1 Atk. 507; *Smith v. McKittrick*, 51 Iowa, 548; *Barber v. Davidson*, 73 Ill. 441; *Tolwey v. Lawsey*, 106 Mass. 100; *Beck v. McGillis*, 9 Barb. 35.

Specific gift of mortgage.

Gift of the proceeds of a certain bond and mortgage is equivalent to a gift of that bond and mortgage and is specific. *Gardner v. Printup*, 2 Barb. 83.

A gift of two mortgages, one held by the testator at his death and the other directed by him to be purchased by the executors. Both treated as specific legacies in order to carry out the testator's intention. *Cammann v. Whittlesey*, 70 App. Div. 598, 75 N. Y. Supp. 702; aff'd, 173 N. Y. 618.

A bequest of the interest of a mortgage to one person for life and then the principal of the mortgage to the mortgagor does not extinguish the mortgage during the life of the life beneficiary. *Hancock v. Hancock*, 22 N. Y. 568.

Gift of amount due on mortgage.

Matter of Bouk, 80 Misc. Rep. 196, 141 N. Y. Supp. 922.

A will which devised all the testator's right, title and interest in certain described real estate, which the testator did not own but on which testator had a mortgage, held to convey such property. See N. Y. Law Jour., July 30, 1912.

Increase of specific legacies.

Specific legacies which are productive either in kind or in income carry with them all such increase accruing from date of death of testator. Unproductive specific legacies if improperly converted into cash by executor do not carry with them legal interest from the time of conversion, but only such income as the money has earned. *Matter of Heyl*, 1 Dem. 191; *Matter of Dean*, 1 Dem. 288.

Where a legacy of stock is specific it carries dividends. *Matter of Hastings*, 6 Dem. 307, 16 N. Y. St. Repr. 980, 2 N. Y. Supp. 22.

A specific legacy vests on the death of the testator and the legatee is entitled to the income and profits that proceed from it. When the executor assents to it, the legacy ceases to be part of the testator's assets. But in case of deficiency of assets to pay debts, the executor cannot prudently or properly give such assent, and the specific legacy is subject to application thereof in behalf of creditors. *Matter of Van Houten*, 18 App. Div. 306, 46 N. Y. Supp. 350.

When specific legacy or devise carries with it other personal property.

When a specific legacy is made in general terms, like a certain business, contents of a certain room, or of a building and its contents, the question often arises whether property not mentioned belongs to and goes with the property mentioned. The gift of a printing and bindery business was held to include finished work undelivered, book accounts or money in business account. *Matter of Lowe*, 149 App. Div. 347.

In *Matter of Delaney* (133 App. Div. 409, 117 N. Y. Supp. 838; aff'd, 196 N. Y. 530), testatrix, whose property consisted of three houses and a small amount of personalty, kept in her dwelling house, devised one house to each of her three nieces and gave all of her personal property, of whatsoever sort, in her dwelling to one of the nieces; and it was held that money deposited in banks and represented by pass-books kept in said dwelling did not pass to said niece.

In *Matter of Reynolds* (7 N. Y. St. Repr. 725; aff'd 124 N. Y. 388), it was held that a devise and bequest of all lands and appurtenances, and all furniture and personal property in and upon the same, did not apply to money and evidence of debt, the well-recognized principle applied being that, where a will contained a residuary clause, words in prior clauses are not to be given an enlarged meaning.

The above case was affirmed in 124 N. Y. 388, and the Court of Appeals held that the language employed did not carry with it money and securities in a vault found upon the premises devised.

In *Matter of Long Island Loan & Trust Co.* (92 App. Div. 5, 87 N. Y. Supp. 65; aff'd, 179 N. Y. 520), a bequest was made by an attorney of "all my law business, law books, papers, safe, book cases and office furniture, and all property pertaining to my business," under which the beneficiary contended that debts for legal services, owing decedent at the time of his death, passed to him. This claim, however, was not sustained.

Assent of representative vests title.

The assent of the executor once given to a specific legacy vests the interest at law irrevocably, and an action at law will lie against the executor to recover the thing bequeathed, and it will pass to the legatee's next-of-kin or under his will. *Onondaga T. Co. v. Price*, 87 N. Y. 542.

The assent of the executor may be expressed or implied, and the rule applies although the legatee is himself the executor. *Linthicum v. Caswell*, 19 App. Div. 541, 46 N. Y. Supp. 610; aff'd, 160 N. Y. 702; *Matter of Van Houten*, 18 App. Div. 301, 46 N. Y. Supp. 190.

Where an executor is given a specific legacy he has no right to assent to the appropriation of it by himself, if there is a deficiency of assets to pay creditors, and he will be charged with such property, but not with the income from it. *Matter of Van Houten*, 18 App. Div. 306, 46 N. Y. Supp. 350.

Reducing to possession.

Whether the executor must at the expense of the estate obtain possession of the specific legacy and deliver it, is a question about which there is difference of opinion. *Matter of Utica Trust & Dep. Co.*, 148 App. Div. 525, 133 N. Y. Supp. 145.

¶ 266 Demonstrative Legacy.

A legacy of \$50 a month "out of the rents and income of her estate" is a demonstrative legacy. *Florence v. Sands*, 4 Redf. 206.

"I give \$9,000 to M. which are invested as follows:"—held to be demonstrative and not specific. *Olcott v. Ossowski*, 34 Misc. Rep. 376, 69 N. Y. Supp. 917.

Insufficient fund.

Where the fund is not sufficient to pay a demonstrative legacy in full, the balance is a general legacy and is subject to abatement with other general legacies. *Florence v. Sands*, 4 Redf. 206.

A will directed a devisee to pay a certain sum of money out of a bank deposit standing in the name of the devisee; this deposit had been depleted below the amount of the legacy so given, and it was held that only the amount on deposit passed. *Crawford v. McCarthy*, 159 N. Y. 514; rev'g, 21 App. Div. 484.

Legacy of an annuity. See ¶ 289.

Where an income or annuity is given from certain property to make that legacy demonstrative, a testator should specify certain property which he has, in kind, the income of which shall produce the amount of the legacy. *Walton v. Walton*, 7 Johns. Ch. 258; *Haviland v. Cocks*, 6 Dem. 4, 19 N. Y. St. Repr. 524.

¶ 267 Ademption of Legacies.

Ademption; defined.

Ademption is the revocation of a grant, donation, or the like; especially, the lapse of a legacy,

(1) By the testator's satisfying it by delivery or payment to the legatee before his death.

(2) By his otherwise dealing with the thing bequeathed so as to manifest an intent to revoke the bequest. *Century Dictionary*.

Ademption applies particularly to specific legacies, where the property mentioned is not in existence, or its character has been changed, at the time of the death of the testator.

Ademption is the extinction or satisfaction of a legacy by some act of the testator, which is equivalent to a revocation of the bequest or indicates the intention to revoke. *Burnham v. Comfort*, 108 N. Y. 535.

Gift of a mortgage — held to be specific and to be lost by its payment in the lifetime of the testator. *Matter of Abernethy*, 2 Dem. 341, distinguishing 1 Bradf. 300.

Where a legacy is given a church to pay off a mortgage thereon and at the time of the testator's death the amount of the mortgage has been reduced below the amount of the legacy, the legacy is

not thereby adeemed. *Matter of Gasten*, 16 Misc. Rep. 125, 74 N. Y. St. Repr. 538, 38 N. Y. Supp. 948.

Testator said: "I give and bequeath * * * the sum of \$1,200 and interest on the same contained in bond and mortgage" described in the will — *held* to be a demonstrative legacy, and not subject to ademption. *Giddings v. Seward*, 16 N. Y. 365.

Bequest of residue.

The principle of ademption for advancement does not apply to residuary legatees. *Hays v. Hibbard*, 3 Redf. 28.

But this case was criticized in *Matter of Turfler* (1 Misc. Rep. 58, 23 N. Y. Supp. 135), where it was held that the rule of ademption did apply to a bequest of a residue.

Where a trust fund is given, and upon the death of the beneficiary it is directed that it shall fall into and become part of the residuary estate, a question arises, where general legacies have not been paid in full, whether such fund as part of the residuary estate may be taken to make good the deficiency in the general legacies, or whether it goes to the residuary legatees. This depends upon the scheme of the will, and no general rule can be laid down. *Matter of Title Guaranty & Trust Co.*, 195 N. Y. 339.

Must be occasioned by act of testator.

By her will the testatrix gave a certain savings bank account. She thereafter became incompetent and her committee withdrew the fund and used it for her support. She had other unbequeathed property. It was held that the amount so used should be made good from other property which in that case was not mentioned in the will. That as she had not used the fund her committee could not create an ademption. *Matter of Carter*, 71 Misc. Rep. 406, 130 N. Y. Supp. 201.

Devise of realty; ademption.

The rule of ademption relates only to legacies of personal estate and is not applicable to devises of realty. *Burnham v. Comfort*, 108 N. Y. 535.

The court said, however, in *Snell v. Tuttle* (44 Hun, 324, 7 N. Y. St. Repr. 615), that this case does not hold that a devise cannot be satisfied by a subsequent conveyance of land, but that a devise cannot be satisfied by a subsequent payment of money.

Where the real estate has been converted into personalty, the rule as to ademption does apply. *Matter of Turfler*, 1 Misc. Rep. 58, 23 N. Y. Supp. 135.

The whole scheme of the will may create an ademption of a devise. *Matter of Percival*, 79 Misc. Rep. 567, 140 N. Y. Supp. 180.

Taking of land by eminent domain, and the receipt and retention by the owner of the money awarded therefor, constitutes an ademption which will prevent the devisee of the land under a former will from taking the money. *Ametrano v. Downs*, 62 App. Div. 405, 70 N. Y. Supp. 833; aff'g, 33 Misc. Rep. 180, 67 N. Y. Supp. 128; aff'd, 170 N. Y. 388.

Will speaks from date of death.

The courts of this State have uniformly held that as to personalty the will of a testator speaks as of the date of the death of the testator, and that any article of personal property which the testator owns at the time of his death, which answers to the description of an article bequeathed, passes under the will to the legatee named therein, although such article may not be the identical article owned by the testator at the time the will was executed.

In the case of *Brundage v. Brundage* (60 N. Y. 544), the court said: "It is a general rule that a will speaks from the time of the death of the testator. This rule is not excepted from, in the case of a general bequest of a particular description, as of an ascertained number of shares of a particular stock."

¶ 268 Abatement of Legacies.

Abatement is the reduction of a general legacy made necessary by lack of assets to pay all legacies of its class in full.

If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportions.

Legacies for support and maintenance of near relatives do not abate.

Legacies for support and maintenance of wife and child, otherwise unprovided for, do not abate with general legacies. *Stewart v. Chambers*, 2 Sandf. Ch. 393. The principle has been extended to the analogous case of a bequest by a wife for the support of her husband (*Scofield v. Adams*, 12 Hun, 366), and further extended to bequests for the maintenance of minors who are near relatives of the deceased. *Petrie v. Petrie*, 7 Lans. 93; *Bliven v. Seymour*, 88 N. Y. 469.

It must appear that the relative is otherwise unprovided for. *Matter of Wenner*, 125 App. Div. 358, 110 N. Y. Supp. 694; aff'd, 193 N. Y. 672.

A gift for use of husband for his life held not to abate. *Scofield v. Adams*, 12 Hun, 366.

Bequest of \$4,000 in trust for brother's support — held that such legacy had no preference over a legacy of the same amount given directly to a sister. *Matter of Hinman*, 32 Misc. Rep. 536, 67 N. Y. Supp. 459.

Legacy of a fund to be set apart for use of wife and daughter, but not stated to be in lieu of dower — held must abate with general legacies. *Matter of Williams*, 1 Redf. 208.

Gift of a gold watch to one daughter and immediately following it a gift of "\$35 in money" to another daughter — held that the latter bequest was general, and abated. *Bliven v. Seymour*, 88 N. Y. 469.

A widow was given a legacy in lieu of dower which she accepted. There was a provision that in case of deficiency of assets the legacies "hereinbefore mentioned" should abate *pro rata* — held that the legacy to the widow abated with the others. *Tickel v. Quinn*, 1 Dem. 425.

Gift of a trust fund for use of daughter during life — held to abate with other legacies. *Waters v. Collins*, 3 Dem. 374.

Legacy to children — *held* to abate where they were otherwise provided for both in the will and by their condition in life. *Matter of Carr*, 24 Misc. Rep. 143, 53 N. Y. Supp. 555.

Bequest of \$2,000 to each of five families of grandchildren. On deficiency of assets — *held* that all legacies abated. *In re Williams' Will*, 27 Misc. Rep. 716, 59 N. Y. Supp. 606.

Legacy for erection of headstone or care of burial lot.

A legacy to a cemetery association for the care of the burial lot of the deceased does not abate. *Matter of Hinman*, 32 Misc. Rep. 536, 67 N. Y. Supp. 459.

A legacy for the erection of headstones at the graves of the testator's parents and brothers and sisters was held not to abate. *Wood v. Vandenburg*, 6 Paige, 285.

Devastavit.

The rule seems to be well settled that, where a *devastavit* occurs after a fund for the payment of specific legacies has been set aside, residuary legatees who have received their share may not be compelled to account to the specific legatees (*Buffalo Loan, Trust & S. D. Co. v. Leonard*, 154 N. Y. 142, 146); and it is also the general rule that a shrinkage of assets, merely, does not affect the rights of specific legatees to payment, the loss in such a case being made to fall upon the residuary legatees because it affects only the residue of the estate. In a proper case where the assets have been lost, all legatees may be made to share pro rata in the loss. *Farmers' L. & T. Co. v. McCarthy*, 56 Misc. Rep. 413, 107 N. Y. Supp. 928.

¶ 269 **Legacy to a Creditor is Not a Payment of the Debt Unless the Will Can be so Construed.** See ¶ 284.

The law seems well settled that a bequest or devise to a creditor is not to be regarded as payment of an indebtedness unless the will expressly declares or the surrounding circumstances clearly indicate such an intent on the part of a testator. *Matter of Dailey*, 43 Misc. Rep. 552, 89 N. Y. Supp. 538.

The rule as stated in *Williams v. Crary* (5 Cow. 368), that a legacy given by a debtor to his creditor which is equal to or greater than the debt, shall be considered as a satisfaction of it, has been repeatedly recognized.

But dissatisfaction with this rule is frequently expressed and slight circumstances have been eagerly seized upon to make an exception in its application. *Williams v. Crary, supra*; *S. C.*, 4 Wend. 444; *Mulheran's Executors v. Gillespie*, 12 id. 349; *Eaton v. Benton*, 2 Hill, 576; *Reynolds v. Robinson*, 82 N. Y. 103; *Adams v. Olin*, 61 Hun, 318, 40 N. Y. St. Repr. 551, 16 N. Y. Supp. 132; *Sheldon v. Sheldon*, 133 N. Y. 1.

The rule is a mere presumption, but as a presumption we do not understand that it has been abandoned.

In *Sheldon v. Sheldon (supra)*, the court, referring to the facts in that case, say: "The legacy given to the plaintiff by the will of the husband did not operate as payment. The will contains no words from which any intent can be inferred or found to extinguish any pre-existing debt by means of the bequest. It was an absolute gift, apart from any debt due by the testator to his wife, and no debt is even mentioned or referred to in the will. A legacy to a creditor is not to be deemed in satisfaction of his debt unless so intended by the testator." *Boughton v. Flint*, 74 N. Y. 476.

Declaration of testator.

It is not competent to show by the declarations of a testator, made when the will was drawn, that a legacy was intended as payment for services rendered. *Reynolds v. Robinson*, 82 N. Y. 103; *Phillips v. McCombs*, 53 id. 494.

Carries interest.

A legacy in satisfaction of a debt carries interest from the death of testator. *Parkinson v. Parkinson*, 2 Bradf. 77.

Legacy in payment of a debt must be accepted with all its conditions, if at all.

The courts have held that a legacy to a creditor is not to be deemed a satisfaction of his claim unless so intended by the tes-

tator, inasmuch as a legacy implies a bounty and not a payment. But when it appears that the legacy is intended as a payment of all indebtedness the legatee accepting must conform to all its provisions and renounce every right inconsistent with it. *Havens v. Sackett and Havens*, 15 N. Y. 369.

Courts of equity proceed upon the rule that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, and conform to all its provisions, and renounce every right inconsistent with it. *Chipman v. Montgomery*, 63 N. Y. 234; *Matter of Morey*, 16 N. Y. St. Repr. 777, 1 N. Y. Supp. 687.

Legacy in accordance with agreement.

A legacy may be given pursuant to an agreement to make such a gift, and when it conforms in character and amount to the agreement it will be considered as a performance thereof. *Matter of Sherman*, 24 Misc. Rep. 65, 53 N. Y. Supp. 376.

In this way a person may agree to compensate a person for services by will, and if such provision be made and accepted, it is a complete defense to an action to recover for such services. *McLaughlin v. Webster*, 141 N. Y. 76.

Where there was an agreement to give a legacy of \$2,000, and the will gave it in trust with remainder over to the creditor, after collecting the debt, the legatee was held to have elected to renounce the legacy. *Steglich v. Schneider*, 66 Misc. Rep. 390, 123 N. Y. Supp. 336.

Testimony by executor competent.

Where such an agreement is made between testator and claimant in the presence of the person named as executor, his testimony is not incompetent under section 829, Code Civ. Pro. *McLaughlin v. Webster*, 141 N. Y. 76.

¶ 270 **Legacy in Furtherance of a Secret Trust or Agreement.**

The rule is that, if a testator is induced to make a will by a promise, expressed or implied, on the part of the legatee that

he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel such legatee to apply property thus obtained in accordance with his promise. *Fayerweather Will Case*, reported as *Amherst College v. Ritch*, 151 N. Y. 282, 323-325, and cases cited.

The intention of the testator so to establish a trust may be shown by satisfactory proof of a declared expectation on his part, prior to making the will, that the property will be so applied, and of the acquiescence of the legatee therein. *O'Hara v. Dudley*, 95 N. Y. 403.

The trust springs from the intention of the testator and the promise of the legatee. Both must be established. Even if it is clear that the testator expected that the gift would be applied in accordance with his wishes, if no trust was intended and accepted, the legatee takes an absolute title and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him. *Amherst College v. Ritch*, *supra*; *Miller v. Hill*, 64 Misc. Rep. 199, 118 N. Y. Supp. 63.

The burden is upon plaintiffs to make out their case by clear, certain and convincing proofs. *Ripsom v. Hart*, 64 App. Div. 593, 72 N. Y. Supp. 791.

To impress a fund with a secret trust, an equity action must be brought where extrinsic facts may be produced. *Matter of O'Hara*, 95 N. Y. 403.

A surrogate has no jurisdiction upon probate of a will to establish a trust *ex maleficio*. *In re Keleman*, 126 N. Y. 73; *aff'g*, 57 Hun, 165.

Extrinsic evidence is not admissible to show intent, and where a gift is made absolute on its face, with unexpressed desire that such gift shall be used for charitable purposes, the gift is valid and that is the only question of issue. *Matter of Keleman*, 126 N. Y. 73; *aff'g*, 57 Hun, 165.

A bequest to persons, saying, "I am satisfied that they will follow what they believe to be my wishes," *held* a valid bequest

to such individuals. *Edson v. Bartow*, 154 N. Y. 199; aff'g, 77 Hun, 298; mod'g, 10 App. Div. 104.

¶ 271 Bequest by Implication.

Bequests and devises by implication are not infrequent. Where land is devised to the heir after the death of A, although no specific life estate is conferred upon A, he takes one by implication.

In *King v. Barker* (3 Bradf. 126) the testator devised and bequeathed the residue of his estate to children of his deceased brothers as tenants in common, and provided as follows: "And should either of the said seven children die before me, without leaving any child or other descendant, I hereby give, devise, and bequeath the residuary share or portion of the one so dying to her or his surviving brothers or sisters." One of the residuary legatees having died before the testator leaving children, it was held by the surrogate, although there was no express gift, that there was an implied gift to such children.

The opinion in the above case is a logical and learned one, and refers to the authorities sustaining the holding at hand at the time it was written. The question does not appear to have been considered by any other of the courts of this State. In England, however, the question has been considered in several cases. *Matter of Disney*, 118 App. Div. 378.

"To uphold a legacy by implication, the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to permit of no other reasonable inference." (*Bradhurst v. Field*, 135 N. Y. 564, 568.) Another case states the rule even more forcibly. "To devise an estate by implication, there must be such a strong probability of such an intention to give one, that the contrary cannot be supposed." (*Post v. Hover*, 33 id. 593, 599.) Especially is this true when the implication sought to be drawn will result in the disinherison

of an heir. (*Scott v. Guernsey*, 48 N. Y. 106; *Quinn v. Hardenbrook*, 54 id. 83; *Lynes v. Townsend*, 33 id. 558; *Dreyer v. Reisman*, 202 id. 476.)

¶ 272 Bequests for Funeral Expenses, Monuments, and Cemetery Lots. See ¶ 411.

A valid trust may now be created for the care and maintenance of cemetery lots and the erections thereon. See ¶ 326.

The will of an illiterate person provided that after the payment of debts the balance of the estate should be expended in the building of a monument and a suitable fence and fixtures — *held*, that testator intended to give from the balance only a reasonable amount for such purpose. *Matter of Boardman*, 46 N. Y. St. Repr. 444, 20 N. Y. Supp. 60.

Testator gave to his executor all his property, amounting to about \$1,200, for his funeral expenses and monument — *held*, that the deceased did not intend to give all, but only such an amount to be expended for a monument as would be desirable, and allowed \$150 for such purpose. *Emans v. Bickman*, 12 Hun, 425.

A bequest of the residue of the estate to the executor in consideration of his defraying funeral expenses and keeping a burial lot in order is good. *Matter of Raab*, 42 App. Div. 141, 58 N. Y. Supp. 1043.

Estate of \$2,410. Provision in the will authorizing the executor to purchase a lot and a monument of New England granite, etc., and to erect a suitable fence. The executor spent \$1,050 and the court said it was too much, considering the amount of the estate. *Matter of Smith*, 75 App. Div. 339, 78 N. Y. Supp. 130.

Will directed the expenditure of a sum not to exceed \$2,000 in repair of a cemetery lot. The executors built a sarcophagus, exchanged a monument for a better one, and erected headstones and coping — *held* within their authority. *In re Frazer*, 92 N. Y. 239.

Bequests for masses. See ¶ 328.

Bequests to the priest of St. Mary's Church of Lancaster, N. Y., of \$600 for masses, etc., estate of \$1,700 — *held*, that the priest would become entitled to the bequest by showing that he had performed the duty. *Matter of Zimmerman*, 22 Misc. Rep. 411, 50 N. Y. Supp. 395.

Will directed that the executor take "\$100 for the purpose that masses be read for my poor soul" — *held* valid. *Matter of Hagenmeyer*, 12 Abb. N. C. 432, 2 Dem. 87.

A gift to an organization for the benefit of the purgatorial fund is not a trust and is valid. *Johnston v. Hughes*, 187 N. Y. 446; *rev'g*, 112 App. Div. 524.

Where no pastor is mentioned by name, the legacy is payable to the pastor of the church named, who was such at the time of the death of testator. *Matter of Rywolt*, 81 Misc. Rep. 103.

Before the amendment of 1893.

Such cases as *O'Connor v. Gifford*, 117 N. Y. 275; *Schwartz v. Bruder*, 6 Dem. 169, 20 N. Y. St. Repr. 363, 3 N. Y. Supp. 134; *Holland v. Alcock*, 108 N. Y. 312, holding that bequests for masses were void were decided before the amendment of 1893, which changed the rule regarding indefinite beneficiaries. See ¶ 273.

¶ 273 Grants and Devises of Real Property for Charitable Purposes. See ¶ 328.

Grants and devises of real property for charitable purposes.

1 No gift, grant, or devise to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, or devised for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

2. The supreme court shall have control over gifts, grants, and devises in all cases provided for by subdivision one of this section, and whenever it

shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant, or devise to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant, or devise shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein; provided, however, that no such order shall be made without the consent of the donor or grantor of the property, if he be living.

3. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the courts.

§ 113, Real Property Law.

Gifts and bequests of personal property for charitable purposes.

Consult section 12, Personal Property Law, for a similar statute.

Appointment of trustee.

The court would doubtless be influenced in the choice of a trustee by the nature of the charity to be administered, and, therefore, would naturally appoint the institution sought to be benefited by the will. *Bowman v. Dom. & For. M. Soc.*, 182 N. Y. 494.

The Attorney-General should not be appointed trustee of a charitable trust which vests in the Supreme Court for charitable uses. *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149; aff'd, 201 N. Y. 546.

The statute applied.

The statute does not empower the courts to modify or alter the directions of a testator, but merely validates testamentary directions which before its enactment would have been void. *Mount v. Tuttle*, 183 N. Y. 358; aff'g, 99 App. Div. 433.

The obvious intention of the Legislature was not to provide for trusts to be created for the benefit of the institutions of another State, but to foster permanent trusts for religious, educational, charitable, and benevolent purposes within our own State, and this

view finds support in *Allen v. Stevens* (161 N. Y. 122, 141), where Parker, Ch. J., after reviewing the conflicting decisions respecting charitable uses, sets forth the statute and says: "Reading the statute in the light of the events to which reference has been made, it seems to me very clear that the Legislature intended to restore the law of charitable trusts as declared in the *Williams* case (8 N. Y. 525); that having discovered that legislative enactment had operated to take away the power of the courts of equity to administer trusts that were indefinite as to beneficiaries, and had declared a permanent charity void unless the devise in trust was to a corporation already formed or to one to be created, it sought to restore that which had been taken away through another enactment." *Catt v. Catt*, 118 App. Div. 742, 103 N. Y. Supp. 740.

Indefinite and uncertain.

A bequest for the "Lord's work" held to be so indefinite as not to be saved by the statute. *Matter of Compton*, 72 Misc. Rep. 289, 131 N. Y. Supp. 183.

Executors authorized to give to charitable and benevolent institutions selected by them — upheld — *Matter of Cunningham*, 206 N. Y. 601.

Deposit in trust for "Benevolent Object," held to be too indefinite. *Warburton Ave., B. C. v. Clark*, 80 Misc. Rep. 306.

To foreign religious corporation.

A bequest to a foreign religious body will be held valid if the body is authorized to take by the law of the State of its location, even if it would not be authorized to take under our laws. *Matter of Bullock*, 6 Dem. 335, 11 N. Y. St. Repr. 700.

It has been held that the Board of Foreign Missions of the Presbyterian church in the United States might take devises and bequests for the purpose of higher education, and property to be used as a home for missionaries. *Boardman v. Hitchcock*, 136 App. Div. 253, 120 N. Y. Supp. 1039.

¶ 274 Devises and Bequests to Corporations.

Devise or bequest to corporation to be formed.

It has long been settled in this State that a person may by will devise and bequeath property to a corporation to be formed after his death if it is therein provided that such corporation shall be so formed and the property vest in it within a period not longer than the lives of two persons in being at the time of the execution of the instrument. *Burrill v. Boardman*, 43 N. Y. 254; *Tilden v. Green*, 130 id. 29; *Inglis v. Trustees Sailors' Snug Harbor*, 3 Peters, 99.

There is no reason why property cannot be given to a corporation to be formed after the death of the testator and within the restricted period any more than there is why property should not be given to descendants or other persons thereafter to be born. In determining the legality of the gift there is no distinction between a natural person thereafter to be born and an artificial person thereafter to be organized. *St. John v. Andrews Inst.*, 191 N. Y. 254; mod'g, 117 App. Div. 698.

Where the will directs the business of the testator to be incorporated, the title to the assets passes to the corporation in exchange for stock, and the stock becomes the trust estate where a trust thereof is created. *Boyle v. John Boyle & Co.*, 120 N. Y. Supp. 1048, 136 App. Div. 367.

A direction to the executors to hold the legacy any specified time, if such corporation be not in existence at the death of testator, makes the bequest void. The time must be measured by lives in being. *Southampton Hospital v. Fordham*, 72 Misc. Rep. 247, 131 N. Y. Supp. 91; *Washburn v. Acome*, 74 Misc. Rep. 301, 131 N. Y. Supp. 963; aff'd, 151 App. Div. 948.

A trust may be administered through a corporation to be formed.

A gift for the uses specified in the statute may, under the direction of the will, be administered and enforced by and through a corporation subsequently created for that purpose. *St. John v. Andrews Institute*, *supra*; *Matter of Robinson*, 203 N. Y. 380.

If a trust is created, such trust may be valid and the same vest in the Supreme Court or in the trustees of a corporation formed after the death of testator. *Matter of Powell*, 136 App. Div. 830, 121 N. Y. Supp. 779.

Effect of subsequent incorporation.

It is the rule that where a devise or bequest is intended to be vested in the beneficiary, not at the death of the testator, but at some later time, it is immaterial whether the beneficiary is capable of taking at the time of the death, provided he is capable at the time when the gift is intended to become vested. *Lougheed v. Dykeman's Baptist Church*, 129 N. Y. 211.

But where the gift is vested, subsequent incorporation will not save the bequest. *Wait v. Soc. for Political Study*, 68 Misc. Rep. 245, 123 N. Y. Supp. 637.

Devises and bequests to corporations made in wills executed within two months of death, which were invalid, are now valid.

In 1911 sections 18, 19 and 20 of the Decedent's Estate Law restricting devises and bequests to corporations made in wills not executed two months before death were repealed, and therefore at the present time the validity of a bequest or devise to a corporation does not depend on the time of the execution of a will, with reference to the death of the testator.

In connection with the repeal of the above mentioned sections, chapter 857, Laws of 1911 repealed sections 18 and 19 of the Membership Corporations Law, which referred to the right of certain corporations to take devises and bequests.

Persons having relatives may not devise property by will, to benevolent or other societies beyond one-half.

No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more.

§ 17, Decedent Estate Law.

To what corporations applicable.

This act does not apply to the University of Rochester, an educational institution incorporated by the Regents of the University of New York. *Matter of Morgan*, 56 Misc. Rep. 235.

This act applies to corporations created after the death of testator. *Allen v. Stevens*, 33 App. Div. 485, 54 N. Y. Supp. 8, rev'g, 22 Misc. Rep. 158, 49 N. Y. Supp. 431.

Does not apply to a devise or bequest to individuals in trust for charitable purpose. *Allen v. Stevens*, 161 N. Y. 122-148, rev'g, 33 App. Div. 485, 54 N. Y. Supp. 8

The statute applied.

The whole estate must be considered as converted into money at testator's death and the money value of the portion or interest so given ascertained, and if this is not more than one-half of the whole the statute has not been violated

Where a legacy was given to a church which was more in amount than one-half of the estate, the balance does not pass under the residuary clause, but becomes undisposed of assets. *Matter of Counrod*, 27 Misc. Rep. 475, 59 N. Y. Supp. 164.

To ascertain whether the gift is more than one-half the estate the value at the death of deceased must be obtained and the computed value of life estate deducted. *Hollis v. Drew Theo. Sem.*, 95 N. Y. 166.

A testator leaving a wife cannot give more than one-half of his estate to charitable corporations. *Jones v. Kelly*, 170 N. Y. 401, aff'g, 63 App. Div. 614, 72 N. Y. Supp. 24.

Where testator owned land in a foreign country which was not disposed of by his will, but by the laws of that country, it was held that the whole estate must be considered in determining whether more than one-half had been disposed of. *Matter of Moderno*, 5 Dem. 288, 5 N. Y. St. Repr. 362.

Ascertaining value of estate; deduction for value of life estate.

In *Hollis v. Drew Theo. Sem.* (95 N. Y. 167), it was held that where a will directed the executors to convert the bulk of the

estate into money, to invest the same, and to pay the income of different portions thereof to certain persons named during their lives, respectively, and upon their deaths gave the principal sums to certain scientific and educational corporations, in determining whether the statutory limit had been exceeded, the value at the time of the testator's death of the portion of the estate so disposed of should be ascertained, and from this should be deducted the values of the life estates, computed according to the proper annuity tables, and the balance represented the value of the remainders given to the corporations, and, this being less than one-half of the value of the estate at the time of the testator's death, the bequests were valid. The opinion in that case in various terms illustrates this principle, and clearly indicates that, in arriving at the values of the gifts to charities, the present value of life estates must be deducted, and only the balance, after such deduction is made, is the value of the gift to charities. *Matter of Strang*, 105 N. Y. Supp. 568, 121 App. Div. 112.

How determined.

Where a bequest is made to take effect after the termination of a life estate, the value of the estate for distribution must be determined as follows: There should be added the value of the life estate for the time it actually existed, and a proper allowance made for the value of such life estate. *Matter of Teed*, 59 Hun, 63, 35 N. Y. St. Repr. 531, 12 N. Y. Supp. 642; *Matter of Runk*, 55 Misc. Rep. 478, 106 N. Y. Supp. 851.

The value of such life estate, when nothing appears to the contrary, will be the interest which was actually earned upon the life estate during the time of its continuance. *Matter of Teed*, 76 Hun, 567, 58 N. Y. St. Repr. 235, 28 N. Y. Supp. 203.

The amount of the estate cannot be ascertained until the death of the widow in a case where the widow had a right to receive support from the *corpus* of the estate. *Rich v. Tiffany*, 2 App. Div. 28, 72 N. Y. St. Repr. 683, 37 N. Y. Supp. 333.

Upon judicial settlement in the *Matter of Strang* (121 App. Div. 112), the value of the life estate was taken to be the estimated

value according to the age of the widow, and not the actual value as demonstrated by her actual life, and the corporation's proportional part thereof was deducted from its legacy, and it was thus shown that the corporation did not receive one-half the estate. See also *Frost v. Emanuel*, 152 App. Div. 687, 137 N. Y. Supp. 559.

Ascertaining value of dower.

It is unquestionably true, as a general proposition, that in determining how much a testator may lawfully give to charities the value of the widow's dower must be deducted from the gross value of the estate, because, at the time of death, the dower right is the property of the widow and not of the testator, and is, therefore, not devisable. *Chamberlain v. Chamberlain*, 43 N. Y. 424. Dower is, however, a right or interest in the testator's real estate which may be released by the widow, and it is deemed to be released when she accepts a provision made for her by the will and therein declared to be given in lieu of dower. Where the widow has, by acceptance of the provision of the will, released to the estate her right of dower, this release must be held to date back to the testator's death. The reason for the rule that the value of the dower must be excluded in estimating the amount of the devisable estate, therefore, disappears, and the rule itself is rendered inapplicable, and the question must be considered as if the whole estate left by the testator, excluding his debts, but including the value of the widow's dower, was disposed of by the will. *Lord v. Lord*, 44 Misc. Rep. 530, 90 N. Y. Supp. 143.

Deducting expenses of administration.

Expenses of administration cannot be deducted from the amount awarded to the corporation, but must be paid from the true residuary estate, namely the amount going to the next of kin by force of the statute. *Matter of Johnston*, 76 Misc. Rep. 391, 137 N. Y. Supp. 166.

Who may raise the objection.

The rule established by the cases is that, where there are any persons who would take from the testator as an intestate in connection with any one of the persons named in the statute, those persons may claim and have their respective rights which have been preserved to them by the act of 1860; but, where the person or persons named in the statute would take under intestacy the whole estate, no other persons have any present interest in the estate, nor can they enforce the prohibition of the statute. *Matter of Eldridge*, 55 Misc. Rep. 636, 106 N. Y. Supp. 1036.

A husband who is sole next of kin may by antenuptial agreement waive the statutory provision, and the next of kin not entitled to the estate cannot raise the statute. *Matter of Stilson*, 85 App. Div. 132, 83 N. Y. Supp. 67.

Forty years ago in *Harris v. American Bible Society* (2 Abb. Ct. of App. Dec. 316), the Court of Appeals held that the provision of the statute may be insisted on by any person who derives a benefit therefrom, although not one of the relatives designated in the statute. The case has been repeatedly followed and its authority has never been questioned. As late as the 136th New York the Court of Appeals said in *Matter of Will of Walker* (p. 20), that a will is to be read as if the statutory restriction was part of it and it had in terms provided that the legacies or devises given by it to charitable corporations should not exceed one-half of the estate. *Robb v. Wash. & Jeff. Col.*, 185 N. Y. 485; mod'g, 103 App. Div. 327.

A cousin if the nearest next of kin, and if entitled to take a part of the estate may take advantage of the statute. *Moser v. Talman*, 114 App. Div. 850, 100 N. Y. Supp. 231.

Relatives or heirs not named in the law have no standing in court to insist on its enforcement, although they would benefit thereby. *Allen v. Stevens*, 22 Misc. Rep. 158, 49 N. Y. Supp. 431; rev'd, 33 App. Div. 485, 54 N. Y. Supp. 8; which was rev'd, 161 N. Y. 122.

Only the persons named and those benefited through them can

invoke the protection of the act, and its protection can be waived or relinquished by those entitled thereto. *Amherst College v. Ritch*, 151 N. Y. 282, aff'g, 91 Hun, 509, 36 N. Y. Supp. 576, 71 N. Y. St. Rep. 607; which aff'd, 10 Misc. Rep. 503, 31 N. Y. Supp. 885, 64 N. Y. St. Rep. 758.

Any person who would take a part of the residue may take advantage of the statute. *Robb v. Washington & Jeff. Col.*, 103 App. Div. 327; modified in 185 N. Y. 485.

Property passing under power of appointment.

The property which passes under a power of appointment by will is not property of the grantee of the power, and the husband of such person cannot raise the objection that this statute has been violated. *Farmers L. & T. Co. v. Shaw*, 127 App. Div. 656, 111 N. Y. Supp. 1118

Where bequest is made to a corporation, surrogate may determine whether it is a de facto corporation.

In *Matter of Arden* (20 N. Y. St. Rep. 865, 4 N. Y. Supp. 177), the right of a residuary legatee to take the bequest was challenged on the ground, among others, that the church was not legally incorporated. The surrogate determined that question, but refused to consider whether it had been dissolved or had forfeited its charter by acts subsequent to the incorporation. The issue was made on probate.

Carpenter v. Historical Society (2 Dem. 574) was a case where a legatee applied to be made a party to probate proceedings, and the question arose whether the legatee was a corporation or a voluntary association. The surrogate considered the certificate of incorporation and the act under which due incorporation was claimed, and decided that the applicant had a corporate existence.

In *Smith v. Havens Relief Fund Society* (44 Misc. Rep. 594-606, 90 N. Y. Supp. 168; aff'd, 118 App. Div. 678); the Supreme court in an action to construe a will considered the certificate of incorporation and determined for the purposes of that action that the society was legally incorporated.

Surrogate may recognize a *de facto* corporation. See ¶ 302.

“Under the authority to determine whether the legatee is competent to take the legacy, we, of course, are authorized to determine the extent of the corporate authority, but the corporate existence is quite another thing. While I think the Andrews Institute was legally incorporated, it is at least a *de facto* corporation acting under color of law, and apparently recognized by the State, under whose laws it has sprung into existence, and with little likelihood of its corporate existence being drawn in question.” *St. John v. Andrews Inst.*, 117 App. Div. 698, 102 N. Y. Supp. 808.

“It is urged by the petitioners that the Samaritan Hospital is not a legal corporation, and therefore, the said bequest and the bequest of the residuary estate to it are void. This issue makes it necessary for the surrogate to determine whether or not the Samaritan Hospital filed a proper certificate to become a legal corporation; for, if it did not become a legal corporation, the legacies to it are void, and the next of kin are consequently interested parties on this judicial settlement.” *Matter of Nason*, 104 N. Y. Supp. 601, 53 Misc. Rep. 187; app. dism. 119 App. Div. 927.

Certificate of incorporation.

Merely because the declared purposes are very broad in their scope, and in part perhaps a bit indefinite, does not affect the validity of the incorporation as such. *Smith v. Havens Relief Fund Society*, 44 Misc. Rep. 594–608, 90 N. Y. Supp. 168; aff'd, 118 App. Div. 678.

The charter of a charitable corporation (an old men's home) is not invalidated by charging an entrance fee, since where the object and practice are charitable, such a charge possessed no element of private or corporate gain. *Matter of Vassar*, 127 N. Y. 1.

¶ 275 Devise or Bequest to Unincorporated Society.

See ¶¶ 305, 328.

An unincorporated society or association cannot take a devise or bequest. *Downing v. Marshall*, 23 N. Y. 366, 382; *Fralick v.*

Lyford, 107 App. Div. 543; *aff'd*, 187 N. Y. 524; *Matter of Scott*, 31 Misc. Rep. 85, 64 N. Y. Supp. 577; *Wait v. Soc. for Political Study*, 68 Misc. Rep. 245, 123 N. Y. Supp. 637; *Bascom v. Albertson*, 34 N. Y. 584; *Carpenter v. Historical Soc.*, 2 Dem. 574.

The law cannot be evaded by giving property to a trustee to be divided among corporations incapable of taking. If such attempt be made, the Supreme Court may be appealed to and such transfer enjoined, unless the bequest is invalid. *Matter of Shattuck*, 118 App. Div. 888, 193 N. Y. 446.

An incorporated voluntary association or society has no legal entity; and it has accordingly been uniformly held in this State that such an association or society is incapable of taking a direct bequest to it. *White v. Howard*, 46 N. Y. 144; *Sherwood v. American Bible Society*, 1 Keyes 561; 4 Abb. Ct. App. Dec. 561; *Fairchild v. Edson*, 154 N. Y. 199; *Murray v. Miller*, 178 id. 316; *Mount v. Tuttle*, 183 id. 358-367; *Matter of Compton*, 72 Misc. Rep. 289, 131 N. Y. Supp. 183.

Bequest to unincorporated religious society declared void. *Lutheran Ref. Church v. Mook*, 4 Redf. 513.

A bequest to an unincorporated religious society which does not name the purpose for which it is made is void. *Matter of Scott*, 31 Misc. Rep. 85, 64 N. Y. Supp. 577.

¶ 276 Bequest of Residuary Estate to Persons Named, or Classes of Persons.

Residuary legacies. See ¶ 284.

No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator is plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated.

While the residuary clause in wills is usually the last of its disposing provisions, still, the mere fact that it is not the last

is not of controlling consequence and can have no effect except as it bears upon the question of the intent of the testator.

Though the residuary clause is usually, it need not necessarily be, the last in the will, and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it. *Morton v. Woodbury*, 153 N. Y. 251.

Until all the valid legacies are paid, there are no assets as to which the testator could be deemed to have died intestate. The rule is well settled that general legacies must be paid in full before residuary legatees are entitled to anything and the general legacy should prevail over an intestacy. *Wetmore v. St. Luke's Hospital*, 56 Hun, 313, 9 N. Y. Supp. 753, 31 N. Y. St. Repr. 334; *Gilbert v. Taylor*, 76 Hun, 92, 27 N. Y. Supp. 828, 57 N. Y. St. Repr. 382.

Legacy to an executor eo nomine.

By the early English law the undisposed of personal estate of the testator vested in the executor beneficially; but any expression in the will indicating a contrary intention, for example, one giving the executor a legacy, was seized hold of by the courts of equity to prevent that result.

The law in this State is that "before a gift to executors *eo nomine* can be held to vest in them individually, the intention that it should so vest must be plainly manifested. *Forster v. Winfield*, 142 N. Y. 327.

If the executor has been given by the will a direct legacy, it is considered very strong evidence that general language claimed to give him the residue as executor is not intended to vest title in him individually. *Christman v. Roesch*, 132 App. Div. 22, 116 N. Y. Supp. 348; *aff'd*, 198 N. Y. 538.

Devise or bequest to those persons who would take the estate by the laws of intestacy.

Such language constitutes a devise or bequest as though the parties and the extent of their shares had been mentioned. *De*

Caumont v. Bogert, 36 Hun, 382-391; *Bowron v. Kent*, 51 Misc. Rep. 136, 100 N. Y. Supp. 768.

A bequest, after a life estate, to those persons who, if testator's death occurred at the death of the life beneficiary, would then be testator heirs-at-law by blood, vests title in a son of testator from testator's death. *Minot v. Minot*, 17 App. Div. 521, 45 N. Y. Supp. 554.

¶ 277 Legatees and Devisees Hold Title in Common, Unless Otherwise Expressed.

When legatees take in common or in joint tenancy.

Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate vested in executors or trustees, as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised.

§ 66, Real Property Law.

This statute applies to personal as well as real estate. *Mills v. Husson*, 140 N. Y. 99.

The rule that a legacy to two or more persons named, without further qualifications, constitutes a legacy to them as tenants in common, and not as joint tenants, is now well settled in this State; and upon this question the early cases of *Putnam v. Putnam* (4 Bradf. 308) and *Gardner v. Printup* (2 Barb. 83) must be regarded as overruled. *Matter of Munter's Will*, 19 Misc. Rep. 201, 44 N. Y. Supp. 605.

Distribution under power.

Where a distribution under a power is directed to be made to, among, or between, two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.

§ 158, Real Property Law.

Legacy to a class; only survivors take.

A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number. *Matter of Kimberley*, 150 N. Y. 90; *Matter of Barrett*, 132 App. Div. 134; *Matter of King*, 135 App. Div. 781, 116 N. Y. Supp. 756.

Where the bequest is to a class to take at a certain time, the rule seems to be that where some of such persons are incompetent to take either by death, alienage, or other disability, the remainder of the class takes what was intended for all. *Van Cortland v. Laidley*, 59 Hun, 161, 32 N. Y. St. Repr. 585, 11 N. Y. Supp. 148.

The clear weight of authority is in favor of the proposition that a bequest to a class does not include persons dead before the making of the will, who, had they survived till that time, would have fallen within the description given to the class, of course, in the absence of something in the will or surrounding circumstances to show a different intent.

Where the bequest is to those living at a fixed time, the persons constituting the class are fixed and designated as though named. *Matter of King*, 200 N. Y. 189.

Where the will gave the residuary estate to "sisters and brothers or their heirs" it was held that the estate should not be divided among the brothers and sisters who were alive at the time of making the will, and so excluding their descendants. *Matter of Edwards*, 132 App. Div. 544; rev'g, 60 Misc. Rep. 394, 117 N. Y. Supp. 3.

Where a legacy was given to brothers and sisters and their heirs, some of whom were known by testator to be dead, and the residuary estate was divided among the same brothers and sisters, the words "their heirs" were supplied in the residuary clause to conform to the intention of the testator. *Renkert v. Bastian*, 75 Misc. Rep. 532, 135 N. Y. Supp. 791.

A trust estate intervening the persons constituting the class were ascertained as of the date of distribution. *Robinson v. Martin*, 138 App. Div. 310; aff'd, 200 N. Y. 159.

Death before that of testator.

Where testator gave legacies to the nephews of her husband living at his death (he being then dead) it was not a gift to a class, but to those persons, and they did not take as a class. *Matter of King*, 200 N. Y. 189.

¶ 278 Effect of Giving Power of Absolute Disposition to Legatee or Devisee; Remainder Over. See ¶ 70.

When the Legislature adopted the Revised Statutes it intended to make the article with regard to powers a complete and exclusive code upon the subject and that article is applicable as well to powers concerning personal property as to those affecting real estate. *Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 id. 295; *N. Y. L. I. & T. Co. v. Livingston*, 133 id. 125; *Cochrane v. Schell*, 140 id. 516; aff'g, 64 Hun, 576.

Testator may create a valid remainder over in case any part of the legacy is unused.

Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts.

§ 149, Real Property Law.

In *Leggett v. Firth* (132 N. Y. 7), the primary devise to the widow was absolute, but there was a provision that on the decease of the widow "the remainder thereof, if any," should go to other parties. It was held (p. 12) that the widow took only a life estate with a power of sale to be exercised during her life for her own benefit.

In *Matter of Cager* (111 N. Y. 343), there was a gift to the wife of all the estate, real and personal, "to be used and en-

joyed, and at her disposal during the term of her natural life." Any that might remain at her decease was given to other parties. It was held that the widow had power to dispose of the *corpus* of the estate, but that this power was not intended to be absolute and unconditional, "but was limited by the language devising the property for her use and enjoyment during her life, and did not give her the power of disposing of it by will."

In *Wells v. Seeley* (47 Hun, 109, 13 N. Y. St. Repr. 239), there was a residuary devise to the wife "to be held and used by her as she shall see fit and proper, during the full term of her life, and at her death, if any part of my said estate shall remain unexpended," then over to others. It was held to be the intention to give to the wife the use of the property during her life, with the power to use such portion of the principal as should, in her opinion, be necessary for her support and to carry out the provisions of the will.

A bequest with power of disposition during life, and a gift over of the remainder, is not an absolute gift so that the remainder can be disposed of by will. *French v. French*, 52 Hun, 303, 23 N. Y. St. Repr. 450, 5 N. Y. Supp. 249.

The validity of a gift over dependent upon a remainder being left undisposed of by a legatee who is given the right to use the principal is not impaired by sections 149 and 153 of the Real Property Law. *Hasbrouck v. Knoblauch*, 130 App. Div. 378, 114 N. Y. Supp. 949.

Gift of life use of real estate with power to sell and use for her support by wife, "leaving all with her to do as she deems best" is not an absolute gift of the proceeds remaining at her death. *Kent v. Fisk*, 151 App. Div. 279, 136 N. Y. Supp. 762.

Remainder undisposed of.

A husband was given use of the estate with power to sell and dispose of the estate, but from such part as remained, certain legacies were given at his death. The wife had no descendants. It was held that as to the part that remained it was charged

with the payment of the legacies, and the remainder was intestate property going to the husband and not to a sister of the wife. *Phillips v. Wisner*, 75 Misc. Rep. 278, 132 N. Y. Supp. 1006; aff'd, 152 App. Div. 911, 137 N. Y. Supp. 1138.

An absolute gift may be defeated by words of limitation to take effect upon the happening of a contingency.

It is settled beyond question that where there is a devise or bequest to one person in terms which would pass the fee or an absolute estate, if there were no words of limitation, and there is a subsequent provision giving the same estate to another upon the happening of a contingency, the devise or bequest over will take effect. In *Norris v. Beyea*, 13 N. Y. 273, it was held that "There is in truth no repugnancy in a general bequest or devise to one person, in language which would ordinarily convey the whole estate and a subsequent provision that upon a contingent event the estate thus given should be diverted and go over to another person. The latter clause in such cases limits and controls the former, and when they are read together, it is apparent that the general terms which ordinarily convey the whole property are to be understood in a qualified and not an absolute sense.

* * * So familiar is the doctrine that a limitation may be engrafted upon a devise in fee, that it is that circumstance which forms the distinction between remainders and executory devisees."

There is no repugnancy in a general bequest or devise to one person in language which would ordinarily convey the whole estate, and a subsequent provision that upon a contingent event the estate thus given should be diverted and go over to another person. *Norris v. Beyea*, 13 N. Y. 273; *Tyson v. Blake*, 22 id. 558.

A testator may make a gift dependent upon the happening or not happening of any event in the future, whether in the testator's lifetime or afterward. So held in regard to an advancement made to the legatee in testator's lifetime. *Langdon v. Astor's Est.*, 16 N. Y. 9.

Consult *Matter of Anonymous*, 80 Misc. Rep. 10, 141 N. Y. Supp. 700.

Where an estate is given in one part of the will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt as to the meaning or application of a subsequent clause, nor by any subsequent words which are not as clear and decisive as the words giving the estate. *Banzer v. Banzer*, 156 N. Y. 429; aff'g, 11 Misc. Rep. 310; *Goodwin v. Coddington*, 154 N. Y. 283; rev'g, 84 Hun, 605; *Clarke v. Leupp*, 88 N. Y. 228; *Roseboom v. Roseboom*, 81 id. 356; *Brynes v. Stilwell*, 103 id. 453; *Washbon v. Cope*, 144 id. 287; rev'g, 67 Hun, 272; *Mee v. Gordon*, 187 N. Y. 400; rev'g, 104 App. Div. 520; *Smith v. Dugan*, 145 App. Div. 877, 130 N. Y. Supp. 649; aff'd, 205 N. Y. 556.

Holographic Will — bequest to one person and “after her death I wish this money to revert to my sons” * * * *held* a life estate in the first legatee. *Matter of Griffin*, 75 Misc. Rep. 441, 135 N. Y. Supp. 518.

Condition subsequent.

A legacy given provided the legatee will write his name in all future time, T. Jackson Boyd, may be paid if the legatee has met the requirements. In the event of a subsequent breach the parties next entitled have their action to recover. *Matter of Jackson's Will*, 1 Pow. Sur. Rep. 241.

¶ 279 Certain Powers Create a Fee.

Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and incumbrancers.

§ 150, Real Property Law.

Power of disposition deemed an absolute devise or bequest.

Every power of disposition by means of which the grantee is enabled, in his life time, to dispose of the entire fee for his own benefit, is deemed absolute.

§ 153, Real Property Law.

A bequest for life with power to dispose of the fund at death with no remainder over is a general and beneficial power, and the grantee takes an absolute fee. *Hume v. Randall*, 141 N. Y. 499; rev'g, 65 Hun, 437; *Deegan v. Wade*, 144 N. Y. 573; aff'g, 75 Hun, 39; *Matter of Moehring*, 154 N. Y. 423; aff'g, 19 App. Div. 629, 46 N. Y. Supp. 1097.

A will which directed the remainder of the estate to be disposed of by C "as may seem best to them at that time," was held to vest an absolute fee in C. *Matter of Perkins*, 68 Misc. Rep. 255, 124 N. Y. Supp. 998.

Power of appointment by will — legatee died before testator, leaving will, held that no power of appointment existed. *Matter of Mayo*, 76 Misc. Rep. 416, 136 N. Y. Supp. 1066.

The case of *Van Horne v. Campbell*, 100 N. Y. 287 decided that at common law an executory devise or bequest was void if the first taker was given the absolute power of disposition, but it did not determine that the rule had not been changed by the provision of the Revised Statutes re-enacted by section 57 of the Real Property Law, which is applicable to limitations of future or contingent interests in personal property. The case of *Leggett v. Firth* (132 N. Y. 7) decided that the rule of the common law as declared in *Van Horne v. Campbell* (*supra*) was changed by the Revised Statutes. *Tuthill v. Davis*, 121 App. Div. 290, 105 N. Y. Supp. 672.

Absolute gift to wife, requesting her to make certain disposition of the property at her death, does not limit the gift. *Foose v. Whitmore*, 82 N. Y. 405.

Power of disposition to wife "as she may deem best for the comfort and maintenance of the family" imports no limitation upon her estate. *Clark v. Leupp*, 88 N. Y. 228; *Banzer v. Banzer*, 156 id. 432, 435; aff'g, 11 Misc. Rep. 310; *Ludlam v. Ludlam*, 47 Misc. Rep. 232.

In *Campbell v. Beaumont* (91 N. Y. 464), the primary devise was, or was deemed to be, absolute, and the question was whether it was limited by subsequent expressions. It was held not.

In *Terry v. Wiggins* (47 N. Y. 512), there was a residuary devise to the wife "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in whole, if she should require it or deem it expedient to do so." It was said (p. 516), "the power could only be exercised under the will in case the wife should require it or should deem it expedient; that is, with a view to her 'personal use and maintenance,' the purposes for which it was given."

In *Greyston v. Clark* (41 Hun, 125, 4 N. Y. St. Repr. 4), there was primarily an absolute gift to the wife, and for this reason it was held (p. 132) that the widow, during her life, could dispose of the property, although it was not for her support and maintenance.

In *Thomas v. Wolford* (49 Hun, 145, 16 N. Y. St. Repr. 764), 1 N. Y. Supp. 610, a bequest for life with remainder over of what might be left was held to give the widow the power, during her life, to consume or dispose of the *corpus* of the estate as might become expedient or necessary to secure for her its beneficial enjoyment.

Legatee or devisee may be given power of disposition by will.

The statutory provisions defining the quality of the title when the power of absolute disposition of property is given to another by will are found in the Real Property Law, §§ 149-152.

The effect of these sections as to whether a power of appointment creates a suspension of the power of alienation is fully discussed in *Farmer's L. & T. Co. v. Kip*, 192 N. Y. 266.

A power of disposition of a trust estate by will or deed vests an absolute estate in the person for whose benefit such power is exercised. *Phillips v. Pike*, 121 App. Div. 753, 106 N. Y. Supp. 486.

Power of appointment during life of a fund held in trust was allowed to be exercised more than once. *Frankel v. Farmer's L. & T. Co.*, 152 App. Div. 58, 136 N. Y. Supp. 703.

Bequest for life "to be disposed of by her at her death among her lawful issue in such proportions as she shall direct and appoint" — *held*, not to vest absolutely in life beneficiary, but to be a valid power and remainder. *Matter of Welch*, 2 Dem. 124.

Effect of power of appointment.

The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.

§ 41, Real Property Law.

Where there are vested remainders the legatees have absolute power of disposition and such estate is not cut down by a superfluous provision of a will purporting to confer a power of appointment. *Connolly v. Connolly*, 122 App. Div. 492, 107 N. Y. Supp. 185.

Corporation may take.

A corporation may be given a legacy or devise under a power of appointment as well as a natural person. *Farmers L. & T. Co. v. Shaw*, 127 App. Div. 656.

¶ 280 A Beneficiary Given the Income of a Fund with the Right to Encroach upon the Principal May in Certain Cases be the Sole Judge of the Occasion and His Necessities.

Where property is willed without specifying the nature of the estate and the donee is given a power of disposition, the latter takes the absolute title to the property, but where the donee takes an estate expressly for life, with a power of disposal during life, he takes a life estate only, and whatever is left of the estate at the time of the death of the life tenant passes to the remainderman. *Tompkins v. Fanton*, 3 Dem. 4-7.

Will gave the widow the right to possess and enjoy the fund during life, and if necessary to use the principal for her support. No trustee was provided for — *held*, that the widow was entitled to the possession of the estate and had the right to determine how much of the principal she should use. *Matter of*

Grant, 16 N. Y. Supp. 716, 40 N. Y. St. Repr. 944, re-examined 86 Hun, 617, 66 N. Y. St. Repr. 822, distinguishing *Matter of McDougall*, 141 N. Y. 21.

Upon payment of a fund to a widow who has the right to use part or all of the fund for support she becomes trustee for the remaindermen, and that trust devolves on her death upon her representatives and not upon those of the first testator. *Leggett v. Stevens*, 77 App. Div. 612, 79 N. Y. Supp. 289.

Gift of use of \$10,000 to wife "for her own comfort and support and she may use the whole principal sum" and what is left, etc., to remaindermen. This amount was paid over to her without security — *held*, that upon the death of the wife the remainder of the fund passed directly to the remaindermen and not to the representatives of the testator. *Leggett v. Stevens*, 77 App. Div. 612, 79 N. Y. Supp. 289.

There must be evidence on the accounting that the needs of the widow were substantial, and the support must be in accordance with her station in life. *Matter of Wyatt*, 9 Misc. Rep. 289, 61 N. Y. St. Repr. 305, 30 N. Y. Supp. 275.

Devise of a farm limited to such part as may remain after the death of the widow. No trust power given to executor — *held*, that the widow was the one to determine her necessity. *Douglass v. Hazen*, 8 App. Div. 27, 75 N. Y. St. Repr. 395, 40 N. Y. Supp. 1012.

Will gave husband the use of the estate "and any part of the principal that may be needed for his support" — *held*, that the husband was the sole judge of the amount of principal needed for his support. *Matter of Parsons*, 39 Misc. Rep. 126, 78 N. Y. Supp. 975.

Possession of the estate.

Testator gave his personal estate to widow for life for support of herself and children — *held*, that she should have the possession of the personal estate and should use so much as she deemed necessary for their support. *Billor v. Loundes*, 2 Dem. 590.

According to the cases very similar to this which the courts have passed upon, the person having the life estate with power of using the principal has received and retained the possession of the *corpus* of the estate without giving security. *Thomas v. Wolford*, 49 Hun, 145, 1 N. Y. Supp. 610, 16 N. Y. St. Repr. 764; *Champion v. Williams*, 12 N. Y. Supp. 697, 36 N. Y. St. Repr. 706.

Judge Peckham said, in *Matter of McDougall* (141 N. Y. 21): "In other cases where it has been held that the legatee was entitled unconditionally to the possession of the legacy without security, other facts existed, such as where the language of the will made it manifest that the testator intended to give to the legatee power to use in his discretion some portion of the *corpus* of the estate for his support." *Matter of Grant*, 86 Hun, 617, 16 N. Y. Supp. 716; *Matter of Parsons*, 39 Misc. Rep. 126, 78 N. Y. Supp. 975; *Terry v. Rector of St. Stephen's Church*, 79 App. Div. 527, 81 N. Y. Supp. 119; *Swarthout v. Ranier*, 143 N. Y. 499; *Matter of Trelease*, 49 Misc. Rep. 207, 96 N. Y. Supp. 318; *aff'd*, 115 App. Div. 654.

Bequest of income; no remainder over. See ¶ 324.

A gift of the income of property to a person, without limitation as to time, is a gift of the capital, where no other disposition of the capital is made, and this is the case whether the gift is to the separate use of the person entitled, or is made through the medium of a trust. *Matter of Dibble*, 76 Misc. Rep. 413, 137 N. Y. Supp. 86.

A general gift of the income arising from personal property, making no mention of the principal, is equivalent to a general gift of the property itself. *Hatch v. Bassett*, 52 N. Y. 359.

Beneficial power.

A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

§ 136, Real Property Law.

Legacy destroyed in the using. See ¶ 413.

Where the use is given of property, and the property is of such nature that its use is its consumption, the gift will be deemed an absolute one, and a gift over would be void for repugnancy. *Bell v. Warn*, 4 Hun, 406; *Baumgrass v. Baumgrass*, 5 Misc. Rep. 8, 24 N. Y. Supp. 767.

For life; consumed in the using.

Where specific articles, not necessarily consumed in using are bequeathed to a legatee for life, with a limitation over, and without any direction to the executor to hold them in trust for the remainderman, the executor is authorized to deliver the same to the person entitled to a life estate therein; taking from such person an inventory and receipt stating that such articles only belong to the first taker for life, and that afterward they are to be delivered to the legatee who is entitled to them in remainder. *Spear v. Trickham*, 2 Barb. Ch. 211.

CHAPTER XLIV.

Legatees and Legacies and Devises, Continued; Validity, Forfeiture and Lapse; Vesting, Payment and Collection; Annuity.

- ¶ 281. § 47 (D. E.). Validity governed by what law.
Void legacies.
- ¶ 282. Validity depends on will.
- ¶ 283. § 27 (D. E.). Forfeiture.
- ¶ 284. § 29 (D. E.). Lapse.
- ¶ 285. Disposition of void or lapsed legacies.
- ¶ 286. Vesting of legacies and devises.
- ¶ 287. Death of legatee before payment.
- ¶ 288. Legacy to widow in lieu of dower.
- ¶ 289. Annuity.
- ¶ 290. § 2688. Payment of legacies.
- ¶ 291. From what funds payable.
- ¶ 292. Bond required on payment.
- ¶ 293. Retaining for debt.
- ¶ 294. Interest on legacies.
- ¶ 295. Interest on legacy to widow or children.
- ¶ 296. Legacy carries income.
- ¶ 297. Legacy charged on land devised.
- ¶ 298. Power of sale, effect of.
- ¶ 299. Proceeds of sale.
- ¶ 300. Devisee or legatee charged with payment.
- ¶ 301. § 1819. Action to recover legacy.
- ¶ 302. § 2687. Proceeding to compel payment.
- ¶ 303. § 2691. Proceeding to obtain advance payment.

¶ 281 The Validity of a Legacy is Determined by the Law of the State or Country of Which the Decedent Was a Resident at the Time of His Death.

Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death. Whenever a decedent, being a citizen of the United States, wherever resident, shall have

declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws.

From § 47, Decedent Estate Law.

There is no inconsistency between this section and former section 2611, Code Civ. Pro. (Now § 24, Dec. Est. Law.) *Matter of McMulkin*, 5 Dem. 295, 5 N. Y. St. Repr. 349.

Foreign testator.

The validity of a legacy will be determined usually by the law of the domicile of the testator. *U. S. Trust Co. v. Wood*, 146 App. Div. 751, 131 N. Y. Supp. 427; *aff'd*, 205 N. Y. 564.

Void Legacies.

A void legacy is one which cannot take effect by reason of some matter inherent in the gift itself. *Am. & Eng. Encyc. of Law* (2d ed.), vol. 18, p. 747.

A legacy to the person who "takes care of me in my last illness" and "remain with me and prepare me for a Christian death," is void for indefiniteness and uncertainty. *Harrington v. Abberton*, 115 App. Div. 177, 100 N. Y. Supp. 681.

Bequest of furniture, etc., "to A. & B., to be distributed as I may designate and direct them while living"—*held* void. *Ludlam v. Holman*, 6 Dem. 194.

Where testator had based a legacy in his will upon a partnership agreement, and after making such will the agreement had been materially changed—*held*, that the legacy was void. *Walker v. Steers*, 38 N. Y. St. Repr. 654, 14 N. Y. Supp. 398.

Where a person named as legatee is dead at the time the will is made the legacy is void as there is no one in being to take the same. *Meeker v. Meeker*, 4 Redf. 29.

A legacy is void where the power of alienation is unlawfully suspended. *Amory v. Lord*, 9 N. Y. 403.

A bequest to one with the added words, "it being understood between us" etc.—*held*, that it was not the intention to vest

the legacy in the legatee, and was void. *Matter of Philbrick*, 74 Misc. Rep. 327, 134 N. Y. Supp. 325.

¶ 282 **Validity of Legacy Depending Upon Construction of the Will.** See ¶ 69.

While the legality of a legacy is often determined as a question of law, its validity is often determined as a question of fact, and when such a question of fact properly arises, extrinsic evidence may be taken to assist in arriving at the intention of the testator.

The testator's intention can be shown by evidence outside of the will itself.

The current of opinions of the courts in this country is tending very clearly to greater liberality in receiving extrinsic evidence to aid in giving a construction and effect to wills, and show what property was intended to be divided and what persons were intended to take. *Trustees, etc., v. Colgrove*, 4 Hun, 362; *Klock v. Stevens*, 20 Misc. Rep. 383, 45 N. Y. Supp. 603.

Proof may be taken as to all matters which will assist the surrogate in determining to which of two or more institutions the deceased intended to make the bequest. *Matter of North*, 52 Misc. Rep. 429, 103 N. Y. Supp. 574.

Where there is no illegibility about the word written "ten" evidence cannot be received that the scrivener was told to make it "two." *Matter of Lyden*, 64 Misc. Rep. 597, 119 N. Y. Supp. 973.

Misnomer.

A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision or defeat the intention of the testator if, either from the will itself, or evidence *dehors* the will, the object of the testator's bounty can be ascertained. *Lefevre v. Lefevre*, 59 N. Y. 434.

The surrogate decided that a bequest to the Hebrew Orphan Asylum should be paid to the Hebrew Benevolent Orphan Asylum Society; and that a bequest to the Protestant Orphan Asylum of

New York was intended to be for the Orphans' Home and Asylum of the Protestant Episcopal Church; and that a bequest to the New York Catholic Orphan Asylum was intended for the Roman Catholic Orphan Asylum Society of the city of New York. *Matter of Pearson*, 52 Misc. Rep. 273, 102 N. Y. Supp. 965.

Gift to St. Francis Hospital — *held* to be intended for The Sisters of the Poor of St. Francis, who conducted a hospital by that name. *Johnston v. Hughes*, 187 N. Y. 446; rev'g, 112 App. Div. 524.

Proof may be taken as to all matters which will assist the surrogate in determining to which of two or more institutions the deceased intended to make the bequest. *Matter of North*, 52 Misc. Rep. 429, 103 N. Y. Supp. 574.

A bequest to St. Joseph's Union was given to the incorporated society of which St. Joseph's Union was a branch. *Matter of Sliney*, 81 Misc. Rep. 389.

Where bequest was to "home and foreign mission," parol testimony was admitted showing that those societies of the Presbyterian Church were intended. *Board of Missions v. Scovell*, 3 Dem. 516. See also *Matter of Van Derzee*, 66 Misc. Rep. 399, 121 N. Y. Supp. 662.

Bequests to nephews and nieces. One claimed the legacy who had same name but was not of the blood. Evidence taken on question of identity, and claimant not of the blood excluded. *Matter of Butler*, 66 Misc. Rep. 406, 123 N. Y. Supp. 279.

Where legatees have the same name, evidence of family and personal associations, likes and dislikes, nearness or distance of residence, frequency of communication and the like may be received upon the question of identity of the legatee. See ¶ 23, page 105.

Bequest to a corporation by an inaccurate name *held* not to defeat the bequest if there was sufficient evidence in the will to show what corporation was intended, and that parol evidence would not be allowed to prove that he meant a certain corporation. *St. Luke's Home v. Assn. for Indig. Females*, 52 N. Y. 191.

A bequest to the "trustees" of an institution is a bequest to the institution although those having charge of it are called in the charter "managers." *N. Y. Inst. for the Blind v. How's Exrs.*, 10 N. Y. 84.

¶ 283 When a Legacy or Devise May be Forfeited.

Forfeiture of legacy by contest.

Where a will makes a forfeiture of legacy if the legatee "prevents or opposes" the execution of the will, he may still cross-examine the attesting witnesses. *Matter of Bratt*, 10 Misc. Rep. 491, 65 N. Y. St. Repr. 247, 32 N. Y. Supp. 168.

While a provision that a legatee forfeits his legacy if he contests the will is valid, such a clause will be strictly construed. *Matter of Barandon*, 41 Misc. Rep. 380, 84 N. Y. Supp. 937.

Effect of penalty for making contest.

In New York, in the Special Term of the Supreme Court, the validity of such a condition was recognized, but it was held that if there was *probabilis causa litigandi* opposition to the probate of the will would not work a forfeiture of a legacy. *Jackson v. Westerfield*, 61 How. Pr. 399. And in a later case in the General Term of the Supreme Court the general validity of such a condition was again recognized, but it was held that as prohibiting a contest instituted by the guardian of an infant legatee appointed by the Surrogate's Court the condition was invalid as against public policy. *Bryant v. Thompson* (59 Hun, 545, 14 N. Y. Supp. 28), where it was said: "A testator cannot be permitted thus to obstruct, by any clause in his will, the necessary steps prescribed by law for the conduct of judicial proceedings in the case of infants, where the paramount duty of the court is to act in behalf of its wards and for their best interests. No penalty or forfeiture can be worked against such a party who has done nothing more than to submit his rights to the adjudication of the courts."

An appeal in this case was dismissed (128 N. Y. 426), on the ground of want of interest in the appellants. See also *Woodward v. James*, 44 Hun, 95, 7 N. Y. St. Repr. 411. In *Matter of Barandon* (41 Misc. Rep. 380), the validity of a condition for a forfeiture of a legacy or devise in case the will is contested was again upheld. See also *In re Grote's Estate*, 2 How. Pr. (N. S.) 140; *In re Stewart's Will*, 5 N. Y. Supp. 32, 24 N. Y. St. Repr. 322.

In the United States Supreme Court it is stated *obiter*, as the conclusion warranted by the authorities, that where legacies are given to persons upon condition not to dispute the validity of the will, the condition is not in general obligatory, but only *in terrorem*, and if there exists *probabilis causa litigandi*, the nonobservance of the condition will not work a forfeiture, but if there is a gift over of the legacy in case of a breach of the condition, it remains no longer a condition *in terrorem* but assumes the character of a conditional limitation, and breach of the condition will work a forfeiture of the legacy. *Smithsonian Inst. v. Meech*, 169 U. S. 398; *Matter of Wall*, 76 Misc. Rep. 106, 136 N. Y. Supp. 452; *In re Arrowsmith*, 147 id. 1016.

According to the weight of the foregoing authorities the following principles, whether based on proper grounds or not, seem to be established: (1) Conditions annexed to legacies and devises providing for a forfeiture in case the will is contested are valid. (2) In case of a legacy, a breach of the condition will not work a forfeiture unless there is a gift over of the subject-matter of the legacy. (3) If there is no gift over and there was *probabilis causa litigandi*, a breach of the condition will not work a forfeiture either as regards a legacy or devise. (4) Where the will is contested on behalf of an infant legatee or devisee, the forfeiture will not be decreed irrespective of whether there was a gift over or not.

Action after payment of legacy.

Where after payment of a legacy the legatee brings an action contesting the will it is the duty and right of the executor to

bring an action to recover the amount so paid from the legatee. *Kelley v. Winslow*, 73 Misc. Rep. 642.

Forfeiture of rights by devisee or legatee who was a witness to the will.
See ¶ 447.

Devisee or legatee may witness will, but devise to him void.

If any person shall be a subscribing witness to the execution of any will wherein any beneficial devise, legacy, interest or appointment of any real or personal estate, shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest, or appointment, shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

From § 27, Decedent Estate Law.

When share of estate to be saved to such witness.

But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees, named in the will, in proportion to, and out of the parts devised and bequeathed to them.

From § 27, Decedent Estate Law.

A nonresident witness to a will who is also a legatee does not lose his legacy, since the will may be proved without his evidence. *Cornell v. Wooley*, 3 Keyes, 378, 4 Abb. N. S. 40.

Where there are three witnesses to a will and the same can be proved by the testimony of two of them the third, who is also a legatee, does not lose his legacy. *Caw v. Robertson*, 5 N. Y. 125; *Matter of Beck*, 26 Misc. Rep. 179, 56 N. Y. Supp. 853; *Matter of Owen*, 48 App. Div. 507, 62 N. Y. Supp. 919.

A witness to a will may take the share of the estate which he would have taken had the testator died intestate. *Matter of Orser*, 4 Civ. Pro. Rep. 129.

The surrogate has jurisdiction to determine the rights of a subscribing witness to share in the estate. *Matter of Orser*, 4 Civ. Pro. Rep. 129.

A witness to a will whose interest is forfeited under this provision may maintain an action to recover the interest in the estate to which he would be entitled to succeed. See ¶ 447.

Witness must be a subscribing witness.

It will be noticed that this forfeiture applies only to a subscribing witness. Therefore a legatee or devisee may be used as a witness on probate, no objection being made to his competency as a witness or where the probate is made on waivers or on default, to prove the handwriting of the testator or of the subscribing witness, or to show any other necessary facts required to be shown in addition to the testimony of the subscribing witnesses.

¶ 284 Legacies and Devises May Lapse Because of the Prior Death of the Beneficiary.

The rule of the common law that a legacy or devise, given with or without words of limitation lapses in case of the death of the devisee or legatee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, is still in force in this State save so far as modified by statute.

For many years by statute a legacy or devise to a child or descendant did not lapse, and in 1912 the statute was amended so that brothers and sisters were included, and if any of such persons died leaving descendants the legacy or devise passed to such descendants.

Devise or bequest to child or descendant, or to a brother or sister of the testator not to lapse.

Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

§ 29, Decedent Estate Law.

There can be no question as to the evil intended to be remedied by this legislation. It was to abrogate in the case of the death of a child before that of the testator the common-law rule that a devise or legacy to him lapsed and to substitute the children of the deceased child for the primary object of the testator's bounty. *Pimel v. Betjemann*, 183 N. Y. 194, rev'g, 99 App. Div. 559.

Where the legatee or devisee predeceases the testator without leaving issue, this section does not prevent a lapse. *Matter of Rywolt*, 81 Misc. Rep. 103.

Cannot be evaded by gift to "heirs."

This statute cannot be avoided by adding the words "to have and to hold the same to them, their heirs, and assignees forever." *Matter of Wells*, 113 N. Y. 396.

A devise to a man and his "heirs" is a gift with limitation and not as a purchase, and consequently is not a devise to the "heirs." *Van Beuren v. Dash*, 30 N. Y. 393.

A gift to N. T. S. "and his heirs" to be paid to him "or to his heirs" indicates a gift in fee to N. T. S. and not a gift to his heirs if he dies before testator, and, therefore, the legacy lapses. *Matter of Smith*, 33 N. Y. St. Repr. 586, 11 N. Y. Supp. 783.

"Shall die" construed.

The words "shall die" are not to be construed as referring to a time intermediate the making of the will and the death of testator. *Barnes v. Huson*, 60 Barb. 598.

"Shall die" often *held*, to refer to persons who were dead at the time of the making of the will. *Abbey v. Aymar*, 3 Dem. 400.

"Descendant" construed.

"Descendant" means a person who proceeds mediately or immediately from the body of the person of whom it is predicated in the course of generation, and does not include collaterals. *Van Beuren v. Dash*, 30 N. Y. 393.

Death before testator.

Bequest to each child who shall have arrived at the age of twenty-five years — one of such children died before the execution of the will — *held*, that her sole issue was not entitled to the legacy. *Pimel v. Betjemann*, 183 N. Y. 194; rev'g, 99 App. Div. 559.

The fact that the testator knew of the death of a legatee several years before his own death and did not change his will, supposing that the legacy would go to the descendants of the legatee, does not change the application of the general rule as to lapse of a legacy. *Roberts v. Bosworth*, 107 App. Div. 511, 95 N. Y. Supp. 239.

A devise to widow and sister who died before testator lapsed as did a life estate on the residue, where the beneficiary of the life estate died during the lifetime of the testator. *Gill v. Brouwer*, 37 N. Y. 549; app'g, 30 id. 393.

Gift to nephews who did not survive testatrix lapsed. *Matter of King*, 200 N. Y. 189.

Death before that of life beneficiary.

A legacy does not lapse though the legatee die before a person upon whose death the legacy was made payable. *Matter of Weinstein*, 43 Misc. Rep. 577, 89 N. Y. Supp. 535.

Bequest to trustee for the support of mother and sister during mother's life and then to sister. Sister died before mother — *held*, legacy did not lapse but vested at death of testatrix. *Mitchell v. Knapp*, 54 Hun, 500, 27 N. Y. St. Repr. 604; aff'd, 124 N. Y. 654.

Bequests to four persons for life, and as they respectively should die, principal should be paid to the children of each; one died childless — *held*, such legacy lapsed. *Palmer v. Dunham*, 24 N. Y. St. Repr. 997, 6 N. Y. Supp. 262.

Legacy in satisfaction of a debt or of a moral obligation. See ¶ 269.

A legacy in discharge of a legal obligation is not a mere bounty, but is a recognition of a duty and, as such, does not

lapse upon the death of the legatee. *Cole v. Niles*, 3 Hun, 326; aff'd, 62 N. Y. 636; *Matter of Gough*, 74 Misc. Rep. 315, 134 N. Y. Supp. 222.

So also where the intention of the testator is not merely bounty to the legatee, but to discharge a moral obligation recognized by the testator the legacy does not lapse. *Matter of Gough*, 74 Misc. Rep. 315.

Lapse of residuary legacy. See ¶ 276.

Where the whole residue of the estate is given to several persons, one of whom dies before the testator, the other residuary legatees do not take the share of the one so dying, but it will go as intestate property of the testator. *Matter of the Accounting of Benson*, 96 N. Y. 499; *Mount v. Mount*, 3 N. Y. Supp. 190; *Beekman v. Bonsor*, 23 N. Y. 298.

¶ 285 Disposition to be Made of Void and Lapsed Legacies.

Makes up deficiency in general legacies.

A void legacy held to go to make up deficiency in other general legacies, and not to the residuary legatee. *Matter of Botsford*, 23 Misc. Rep. 388, 52 N. Y. Supp. 238; aff'd, 37 App. Div. 73, 55 N. Y. Supp. 495.

A legacy which is void or lapses does not pass to the residuary legatee until all general legacies are paid in full. *Wetmore v. St. Luke's H.*, 56 Hun, 313, 31 N. Y. St. Repr. 334, 9 N. Y. Supp. 753.

Does not make up deficiency where a trust is established.

Legacy given in trust and upon the termination of the trust to fall into the residuary estate does not go to make up the deficiency in general legacies, but goes to the residuary legatees. *Wetmore v. St. Luke's H.*, 56 Hun, 313, 31 N. Y. St. Repr. 334, 9 N. Y. Supp. 753; mod'g, 18 N. Y. St. Repr. 732.

Not into residue.

A lapsed or void devise or legacy will not fall into the residue if a proper construction of the will shows a clear intention of the testator to limit the residue. *Beekman v. Bonsor*, 23 N. Y. 298; *Kerr v. Dougherty*, 79 id. 327; dist'd, 176 id. 535.

In *Langley v. Westchester Trust Co.* (180 N. Y. 326, 331), the case of *Kerr v. Dougherty* was limited, the court saying: "The executors are to pay the specific bequests from the fund, but if they are unable to pay some of them because of their invalidity, then the moneys remaining in their hands are so much of the fund as had not been used or drawn upon for the purpose of payment the specific bequests. In *Riker v. Cornwell* (113 N. Y. 115), a case where the words were 'after payment of all the legacies and carrying out all the trusts and provisions made,' it was argued that they were indicative of an intention to give only a specific residue. We held otherwise and we considered those words as words of description rather than of exclusion and limitation."

In the case of *Moffett v. Elmendorf* (152 N. Y. 475), the testator gave "all my real estate, except the portions thereof hereinafter otherwise given or disposed of," to his wife. There followed specific devises of real estate to other persons, some of which provisions lapsed. Vann, J., in discussing this clause of the will, says: "So the gift of all but certain excepted portions 'otherwise given or disposed of' may refer to gifts effectually made, as distinguished from those which might lapse. By general rule the will speaks from the death of the testator, and as to the second and tenth clauses this is necessarily the result, at least in part, independent of the rule, for until that time it could not be known whether he would leave any children or not or who would be his 'heirs-at-law.' Speaking as of that date lapsed legacies would be ignored the same as if they had not been made. Moreover, a gift of 'all other land,' or of 'all land not hereinbefore devised,' is regarded as a devise of the residue and not as indicating an intention to exclude specific gifts." See also *Hind-*

man v. Haurand, 2 App. Div. 146; aff'd, 159 N. Y. 546; *Lamb v. Lamb*, 131 N. Y. 227.

It is contended that a different conclusion was reached in the case of *Kerr v. Dougherty* (*supra*). In that case the attention of the court was directed to another question which had been elaborately discussed, and then followed a declaration of Miller, J., to the effect that there was no error on the part of the trial court in the conclusion arrived at that the sums bequeathed by the void legacies were undisposed of by the will and that the amount passed to the widow and next of kin. No further consideration appears to have been given in the opinion to that clause of the will. Under another clause he, however, states that "The general rule is that in a will of personal property the general residuary clause carries whatever is not otherwise legally disposed of but this rule does not apply where the bequest is of a residue of a residue and the first disposition fails." These views met with a vigorous protest by Earl and Rapallo, JJ.; Andrews, J., being absent. Apparently, the later cases have given the matter more careful consideration and if the *Kerr* case is in conflict upon this point it must be deemed to have been overruled.

Into residue.

Testator gave his widow a legacy in lieu of dower and of all claims against his estate as widow. She having accepted the legacy — *held*, that she took no part of two lapsed legacies, but that such lapsed legacies fell into the residuary. *Matter of Benson*, 96 N. Y. 499.

A devise which is void for indefiniteness will pass to the residuary devisee as would a lapsed legacy or devise. *Gallavan v. Gallavan*, 57 App. Div. 320, 68 N. Y. Supp. 30; aff'g, 31 Misc. Rep. 282, 64 N. Y. Supp. 329.

Where a particular bequest follows a residuary clause, the bequest is not void, but will be considered as excepted from the residuary clause, but if the bequest lapses it will be held to fall into the residuary. *Morton v. Woodbury*, 153 N. Y. 243.

Case where it was held that void trust fell into the residue, *Trunkey v. Van Sant*, 176 N. Y. 535; rev'g, 83 App. Div. 272, 82 N. Y. Supp. 94.

In the case of *Carter v. Board of Education of the Presbyterian Church* (144 N. Y. 621), the will, after giving certain specific legacies, provided that "whatsoever moneys may remain in the hands of my said executors after paying the foregoing bequests" should be paid to the parties particularly specified. Two of the legacies were declared to be invalid and the contention was that the words "after the payment of the foregoing bequests" indicated an intention not to include in the residuary estate the invalid bequests, and that he, consequently, died intestate as to those items. It was, however, held that the invalid bequests passed into the residuary estate. Gray, J., in delivering the opinion of the court, said: "While the words 'after the payment of the foregoing bequests' in the residuary clause might, in some cases, be deemed to circumscribe and confine the residue, so that a residuary legatee would not be entitled to any benefit accruing from lapses, that effect would be given to them because they would illustrate an intention which was apparent from the will. Judge Earl's observations in *Matter of Accounting of Benson* (96 N. Y. 499) are to be taken, not as laying down an absolute rule that a residuary clause is necessarily circumscribed by the insertion of such words, but as suggesting that they might evidence an intention on the part of the testator that the residue is to be confined to so much only as would remain after deducting from the estate the aggregate amount of all previous bequests. *Langley v. Westchester Trust Co.*, 180 N. Y. 326.

¶ 286 When Legacies and Devises Vest.

Three general rules regarding vesting of legacies.

1. It is a general principle that where the gift is absolute and the time of payment only postponed, time not being of substance

of the gift, but relating only to the payment, does not suspend the gift, but merely defers the payment.

2. Where there is no gift but by direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives.

3. Where the gift is to be severed instantan from the general estate for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal and is to wait only for the payment until the day fixed. *Warner v. Durant*, 76 N. Y. 133.

It is not the uncertainty of enjoyment in the future but the uncertainty of the right to that enjoyment which marks the difference between a vested and a contingent interest.

A NUMBER OF LEADING CASES ARE AS FOLLOWS:

Hennessy v. Patterson (85 N. Y. 91), where subject is discussed. *Loder v. Hatfield*, 71 N. Y. 92.

Vested remainder subject to being opened or defeated. *Moore v. Littel*, 41 N. Y. 66.

Leading case on vesting, perpetuities, etc. *Manice v. Manice*, 43 N. Y. 303.

Pay, divide, assign, etc.

Where, from the examination of the whole will it is apparent that it was the intention of the testator that the estate should vest in the beneficiaries immediately upon his death, the rule governing where there is merely a direction to divide at a future time must be subordinated to that broader rule which requires that the intention of the testator shall control where it can be ascertained "within the four corners of the will." *Matter of Crane*, 164 N. Y. 71, 77.

Where the words are "assign and pay" vesting is postponed, except where such postponement is for the benefit of the estate. *Kunhardt v. Bradish*, 39 Misc. Rep. 103, 78 N. Y. Supp. 902.

Death in lifetime of testator.

Where the disposition of the property which is devised over in case of death is preceded by a prior estate for life or years, then the general rule is that the time of death refers to that which occurs during the period of the intervening estate. *Matter of Farmers' L. & T. Co.*, 189 N. Y. 202; mod'g, 119 App. Div. 104.

Death referred to was not a death in the lifetime of the testator. *Matter of Denton*, 137 N. Y. 428; *Vanderzee v. Slingerland*, 103 id. 47; *Mead v. Maben*, 131 id. 255.

Time referred to was time the will took effect after the death of the life tenant. *Scott v. Guernsey*, 48 N. Y. 106.

Will created a trust for life, and then gave estate to nephews and nieces — *held* that the will spoke as of the time of the death of testator and not as of the date of the termination of the trust. *Matter of Woolsey*, 49 Misc. Rep. 201, 98 N. Y. Supp. 936.

In *Bergmann v. Lord*, 194 N. Y. 70, where the language of the will was as follows:

“Upon and after her (the wife's) death I give and bequeath the capital of said fund unto such of my children as may survive me,” the court said: So far as it relates to the time when the legacy is to be received in possession by the surviving children, is not of the substance of the gift, and does not prevent the remainder vesting absolutely and immediately. *Smith v. Edwards*, 88 N. Y. 92; *Stringer v. Young*, 191 id. 157.

Applied generally.

Devise to son for life and then to grandchildren if son left no children. Son left no children. *Held*, that title vested in grandchildren at death of testator. *Sage v. Wheeler*, 3 App. Div. 38, 74 N. Y. St. Repr. 402, 37 N. Y. Supp. 1107; aff'd, 158 N. Y. 679.

Bequest of residue in trust for the life of the widow to pay her income. At death of widow, whole estate to son. Son died before widow. *Held*, that the estate vested in the son at testa-

tor's death. *Van Camp v. Fowler*, 59 Hun, 311, 36 N. Y. St. Repr. 580, 13 N. Y. Supp. 1.

Remainder held vested. *Roome v. Phillips*, 24 N. Y. 463.

See another phase of same case, 27 N. Y. 357.

¶ 287 **Death of Legatee Before Actual Payment of Legacy in Case Where Gift is Apparently Made to Depend on the Legatee Surviving to Time of Payment.**

In *Finley v. Bent* (95 N. Y. 364), the provision was, "Should either of my children die before the full payment of the whole of his or her share of such residue, then my executors shall pay the share of the child so dying, or so much thereof as shall remain unpaid, to his or her lawful issue then surviving." One of the daughters died after the expiration of five years — *held*, that her legacy had vested.

In *Matter of Wiley* (111 App. Div. 590), the will devised the residuary estate to the testator's wife and to specifically named sisters, nephews, and nieces, share and share alike; and then provided that, in case of the death of either before the whole estate shall be divided, it shall be distributed among the survivors only, share and share alike. One of the nephews was killed after the death of the testator and before any part of the residuary estate had been divided by the executors among the residuary legatees. It was held that he having died before the period of distribution arrived, the limitation over took effect, but this case was reversed in 188 N. Y. 579.

Under the provisions of a will containing a gift over in case of the death of a legatee before payment, actual payment is not essential in order for it to vest absolutely in a legatee; the divesting clause ought not to extend beyond the period in which the legacy is *de jure* receivable, or becomes due and payable, thus avoiding the power of an executor, through delay, caprice, or accident, from preventing an absolute vesting of a legacy. With this limitation no reason is apparent, either in law, public policy, or morals, why the testator may not make his bequests subject to

a provision, clearly and definitely stated, that in case his legatee should die before his legacy become due and payable under the administration of his estate, it shall go over to the child or children of such deceased legatee, and thus prevent its going to the creditors of the legatee or to strangers to the testator or to his blood. *March v. March*, 186 N. Y. 99.

In *Oxley v. Lane* (35 N. Y. 340), the will read: "I will, order, devise, and bequeath that if either of my said sons or daughters, or if both of my said grandchildren shall die without issue before the final distribution of my estate at the end of twenty-five years after my decease as aforesaid, that the share of the party or parties so deceased shall be shared equally among all my other children, share and share alike." The court said: "It qualifies the absolute title and estate previously given to such deceased child or grandchildren by a conditional limitation in favor of all the children of the testator then surviving. * * * This subsequent limitation over is not repugnant to the prior devises and bequests, although they are in language denoting an absolute gift of the whole estate in fee, and it will be sustained as a valid executory gift * * *."

Death before "execution of will."

In a surprising number of cases the testator has provided that the legatee could not take if he died before the "execution of the will." This has been uniformly held to mean before the time for distribution, and not the date of making the will or of the death of the testator. See *Scott v. Guernsey*, 60 Barb. 163, 48 N. Y. 106; *Matter of Kear*, 133 App. Div. 265, 117 N. Y. Supp. 667.

Death before time for payment.

When time of distribution is designated and a bequest is made to such persons as answer a necessary and certain description "at the time of making the payment or distribution" — held to mean at the time when the shares were legally payable and not

when they were actually paid. *Matter of Coolidge*, 85 App. Div. 295, 83 N. Y. Supp. 299; aff'd, 177 N. Y. 541.

Vesting determined by intention of testator in connection with language used. *Whitwell v. Whitwell*, 146 App. Div. 270, 130 N. Y. Supp. 906.

Vesting subject to being divested.

Devise to wife for life or until remarriage, and then to children then living—*held* that the devise vested in the children living at testator's death subject to being divested, and that they could not convey a good title during the life of the widow. *Weinstein v. Kratenstein*, 150 App. Div. 789, 135 N. Y. Supp. 334.

"*First*. I give and bequeath unto my beloved wife, Isabelle Mercein Runyon, all the real and personal property which I may have or be possessed of at the time of my death, for her support during her natural life or widowhood, and in case of her death or marriage, the whole estate, both real and personal, to be divided equally, share and share alike, between my surviving children, and if any one or more of them shall have died leaving legitimate issue, such issue shall have and take the share its parent would have received if still alive." *Held*, that the devise vested on the death of testator. *Runyon v. Grubb*, 119 App. Div. 17, 103 N. Y. Supp. 949; aff'd, 192 N. Y. 586.

¶ 288 Legacy to Widow in Lieu of Dower, or to Creditor has Preference Over General Legacies.

For "Legacy to Widow in Lieu of Dower," see ¶¶ 229, 311.

The law is well settled that where a legacy is given in consideration of the relinquishment by the legatee of some subsisting right or interest, as to a creditor in satisfaction of a debt or to a wife in lieu of dower, such legacy is entitled to priority over general legacies which are mere bounties, for in such cases the legatee stands in the situation of a purchaser and not a mere

volunteer. *Williamson v. Williamson*, 6 Paige, 298; *Matter of Dolan*, 4 Redf. 511; *Isenhardt v. Brown*, 1 Edw. Ch. 411.

Such is the rule, though the value of the legacy greatly exceeds the value of the rights relinquished. *Matter of Dolan, supra*.

In the opinion in the case of *Williamson v. Williamson*, above cited, the chancellor says: "Indeed, a legacy to the widow in lieu of dower is viewed in a more favorable light than a legacy to a child, the widow taking the bequest as an equivalent for her relinquishment of a right, and the child taking it as a mere bounty of the testator. For this reason the legacy of the wife given in lieu of dower does not abate ratably with others, if the fund is insufficient to satisfy all."

In the case of *Isenhardt v. Brown*, above cited, the vice-chancellor says: "The legacies given to her by this will are partly specific and partly pecuniary; and they constitute the provision made for her by the testator in lieu of her right of dower in his estate. It is the price put by the testator himself upon that right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to receive is not by way of bounty, like other general bequests, but as purchase money for what she relinquishes and which, consequently, must be paid in preference to other legacies—they being merely voluntary. *Matter of Woodbury*, 40 Misc. Rep. 143, 81 N. Y. Supp. 503.

A legacy to a widow in lieu of dower must be paid in preference to other general legacies. *Brink v. Masterson*, 4 Dem. 524.

Legacy to widow in lieu of dower does not have preference over debts.

A bequest to a widow in lieu of dower, when accepted by her, is entitled to preference of payment over other legacies, but not over debts due creditors.

A legacy to a widow in lieu of dower cannot be taken from her and applied to the payment of debts until the balance of the estate has been used for such purpose. *Matter of Dolan*, 4 Redf. 511.

A widow who has accepted a bequest in lieu of dower is not entitled as against creditors to priority of payment even to the extent of her dower interest. *Beekman v. Vanderveer*, 3 Dem. 619; *Matter of Nagel*, 35 N. Y. St. Repr. 245, 12 N. Y. Supp. 707.

A bequest to a widow in lieu of dower is a legacy and she is a legatee and shares in other bequests made to the legatees named in the will. *Orton v. Orton*, 3 Keyes, 486.

By a legacy given to the widow in lieu of dower, and its acceptance by her, her interest in the estate becomes that of a creditor.

The legacy was the price tendered to her for the purchase of her interest in the realty. By accepting it she became entitled to the price. It was a debt against the estate, payable like other debts, first out of the personalty, and if that is insufficient, then out of the realty. *Wilmot v. Robinson*, 42 Misc. Rep. 244, 86 N. Y. Supp. 575.

¶ 289 Legacy of an Annuity.

A legacy may consist of the grant of an annuity to a person for life or for a term of years. This is the right to be paid a certain sum of money at stated periods from the general estate or from a certain fund to be set apart. The payment thereof may be a charge upon the income of such estate or fund or it may be charged upon a legatee or devisee of particular property. When so charged the legatee or devisee by accepting the gift assumes and agrees to pay the annuity according to its terms.

Unless otherwise stated the first payment of a legacy of an annuity is due one year from the date of the death of the testator and if not paid at that time it will draw interest from the date it is due. The present value of a legacy of an annuity is computed on the same principle as is the value of dower or curtesy.

Annuity defined.

An annuity is defined to be a periodical payment of money, amounting to a fixed sum in each year, the moneys paid being either a gift or in consideration of a gross sum received. *Century Dictionary*.

In general terms an annuity is a yearly payment of a certain sum of money granted to another in fee for life or for years. *Kearney v. Cruikshank*, 117 N. Y. 95; rev'g, 46 Hun, 219.

An annuity may be made payable semi-annually or quarterly. *Cochrane v. Walker*, 4 Dem. 164; *Stewart v. Chambers*, 2 Sandf. Ch. 382.

The giving of an annuity does not constitute a trust in all cases or a power in trust. The annuitant takes no life estate in the property held by the executors, but simply has the right to be paid the annuity out of the funds in their hands. *Clark v. Clark*, 147 N. Y. 639; aff'g, 84 Hun, 362.

An annuity is a transferable legacy. *Matter of Cocks*, 5 Redf. 406, 414; *Lang v. Ropke*, 5 Sandf. 363, 370; *Hawley v. James*, 16 Wend. 60; *Griffen v. Ford*, 1 Bosw. 123, 143, 144; *Maurice v. Graham*, 8 Paige, 484, 487; *Hunter v. Hunter*, 17 Barb. 25, 90; *Mason v. Jones*, 2 id. 229, 247.

Annuity or income.

It becomes important to determine whether a bequest is an annuity or the income of a fund. The question in each case is whether the testator intended to give a specific sum of money annually, or the income from specific property.

Where a testator directs his executor to invest sufficient of his estate on bond and mortgage to produce interest enough to pay

the annuity, the legacy is general. *Haviland v. Cocks*, 6 Dem. 4, 19 N. Y. St. Repr. 524.

Bequest of income and not of an annuity.

Gift to wife for life of the use of \$10,000, "directing my executors to semi-annually pay to her the lawful interest of the said sum" — *held*, a bequest of income. *Whitson v. Whitson*, 53 N. Y. 479.

Bequest of income of a particular fund is not an annuity. *Stubbs v. Stubbs*, 4 Redf. 170.

D. bequeathed to his wife "the interest upon the sum of \$10,000, to be paid to her annually during the period of her natural life" with a devise over of the principal sum — *held*, that the bequest was of the income of the sum specified and not an annuity of \$720. *Matter of Dewey*, 153 N. Y. 63.

Gift of the interest upon \$1,500 payable annually — *held*, to be a legacy and not an annuity. *Booth v. Ammerman*, 4 Bradf. 129.

Payment of taxes and expenses.

Taxes and expenses cannot be taken from an annuity, but may be taken from a bequest of an income from a fund. *Stubbs v. Stubbs*, 4 Redf. 170.

As to paying taxes and expenses out of the fund there is a difference between a legacy of income and a clear annuity. In the former case such taxes and expenses are payable from the fund, but not in the latter case. *Whitson v. Whitson*, 53 N. Y. 479; *Matter of McComb*, 4 Bradf. 151.

Annuity; first payment.

The first payment on an annuity is due at the end of a year after testator's death. *Lawrence v. Embree*, 3 Bradf. 364; *Booth v. Ammerman*, 4 Bradf. 129.

Where an annuity had been paid yearly and just before the expiration of the year the annuitant died, her administrator was not apportioned any part of the yearly annuity. *Kearney v.*

Cruikshank, 117 N. Y. 95; rev'g, *Reed v. Cruikshank*, 46 Hun, 219, 11 N. Y. St. Repr. 569.

When an annuity is alienable.

An annuity charged upon both *corpus* and income, and not being connected with any trust, is an interest which the law regards as alienable at the pleasure of the beneficiary, and is not, therefore, under the ban of the Statute of Perpetuities. *Matter of Tilford*, 5 Dem. 524. *Matter of Trumble*, 199 N. Y. 454.

An annuity is not a "sum in gross" which can be assigned under 1 R. S. 730, § 63, where it is dependent upon a trust. *Cochrane v. Schell*, 140 N. Y. 516.

A trust to pay annuities may lawfully be created under section 96 of the Real Property Law, and calling it an annuity does not make the interest of the annuitant assignable. This proposition was determined by the Court of Appeals after a learned and exhaustive discussion by Chief Judge Andrews in the case of *Cochrane v. Schell* (140 N. Y. 516), and the rule thus established was applied by the Supreme Court and the Court of Appeals to a provision for the wife in lieu of dower in *Hooker v. Hooker* (41 App. Div. 235, 166 N. Y. 156), and was expressly reaffirmed in the case of *Herzog v. Title Guarantee & Trust Co.* (177 N. Y. 86, 100); *Rothschild v. Roux*, 78 App. Div. 282, 79 N. Y. Supp. 833.

An estate given in trust to pay an annuity from the income with the *corpus* given during the lives of two persons vests upon the death of the survivor of the two persons, subject to the annuity, and is so not subject to the rule against perpetuities. *People T. Co. v. Flynn*, 188 N. Y. 385; rev'g, 113 App. Div. 683. See also 44 Misc. Rep. 6, 106 App. Div. 78.

Creditors of annuitant may reach.

It has been held in this State that the right to receive an annuity can be taken from an annuitant to satisfy the claims of creditors. *DeGraw v. Clason*, 11 Paige, 136.

Determining sum to be set apart.

A decree fixing a sum to be set apart to produce an annuity is binding upon a party afterward raising an issue that the sum so set apart is excessive, if said decree has not been appealed from. *Griffen v. Keese*, 115 App. Div. 264; mod'd, 187 N. Y. 454; *Matter of Willets*, 42 Hun, 658, 44 id. 629, 112 N. Y. 289.

Election to take the sum to be set apart in place of the annuity.

A person entitled to an absolute and unqualified annuity may elect to take the sum directed to be set apart instead of the annuity to be purchased therewith. So far as the estate is concerned, the exercise of election by taking the principal of the fund is not detrimental to the estate, because, whether the principal is laid out for an annuity or whether it goes to the annuitant, it is absolutely lost to the estate. In this vital respect a fund expended to raise an annuity differs from a fund set apart in trust to raise income for a designated beneficiary. An annuity does not possess any element of a trust. *Matter of Collins*, 144 N. Y. 522.

ANNUITIES MAY BE APPORTIONED, like dividends and other income, between the annuitant and the representative under section 2674. (¶ 313.)

Principal may be used to make up deficiency.

Bequest of an annuity to widow to be paid out of income, with balance of income going to other persons—*held*, that the annuity was to be paid in full even if there was not sufficient annual income for such purpose. *Pierrepoint v. Edwards*, 25 N. Y. 128.

One-half of the residuary estate was directed to be put at interest and \$100 a year paid to A.—*held*, that the annuity was not limited to the interest received and that any deficiency should be made up from principal. *Bliven v. Seymour*, 88 N. Y. 469.

Under a will which directed the setting apart of a sum which invested at the rate of 6 per cent. would produce the annuities,

it was *held*, that sum to be set apart must be determined by the rate of interest specified and not by the present prevailing rate. *Matter of Sproule*, 42 Misc. Rep. 448, 87 N. Y. Supp. 432.

Direction to executors to invest sufficient sum to pay widow \$1,000 a year. The bulk of the estate was divided among the remaindermen, and the sum set apart became reduced so that the income did not meet the annuity. *Held*, that the principal of the sum set apart was applicable to the payment of the annuity. *Cocks v. Haviland*, 49 Hun, 301, 17 N. Y. St. Repr. 639.

Deficiency not made up from principal.

It is a well-settled rule that where a legacy or annuity is payable solely out of income and the fund fails to produce the sum required the legacy abates in proportion to the loss of capital or fund.

Such rule is not universally applicable to all annuities given to be paid out of income. If from the will an intention can be discovered that the legacy shall be paid at all events, the intention will not be permitted to be overruled by the direction that the annuity is to be raised out of a particular fund — *held*, that in this case a deficiency in income so that the annuity could not be paid from it in full did not authorize the payment of the deficiency from *corpus*. *Delaney v. Van Aulen*, 84 N. Y. 16.

Deficiency in income in former years may be made good.

Bequest of an annuity to an adopted son from income, balance of income to husband. No bequest of *corpus* or balance of income after death of husband. For some years there was not enough income to pay annuity to son, but later there was a surplus — *held*, that the deficiency arising in former years should be made good from such surplus. *Matter of Chauncey*, 119 N. Y. 77.

An annuitant is entitled to have, in certain cases, all arrearages of lean years satisfied out of the income of after years that are full. *Cochrane v. Walker*, 4 Dem. 164.

A charge on land.

An annuity given by will is a charge on testator's land, where testator left practically no personalty, and the will, which was made two days before her death, devised the rest of the property subject to another legacy. *Arthur v. Dalton*, 14 App. Div. 108, 43 N. Y. Supp. 583, 77 N. Y. St. Repr. 583.

An annuity charged upon land exonerates the personalty, although such intention be not stated. *Matter of Bourry*, 49 Misc. Rep. 389, 99 N. Y. Supp. 511.

Devise of real and personal to trustees and direction to pay annuities, and gift of remainder over — *held*, that the annuities were not charged upon the real estate. *Rothschild v. Roux*, 78 App. Div. 282, 79 N. Y. Supp. 833.

Without any proof as to the actual amount of personal property which the testator owned at the time he made his will and at the time of his death, or of any other circumstances outside the will, the will itself does not disclose any intention upon the part of the testator that an annuity should be made a charge upon real estate. *Morris v. Sickly*, 133 N. Y. 456; *Robinson v. Kelso*, 53 Misc. Rep. 89; *aff'd*, 122 App. Div. 903, 106 N. Y. Supp. 1142.

An annuity *held* to be charged on land when it was directed that it should be paid from rents and profits until a son arrived at twenty-one, at which time the real estate was devised to the son. *Dunham v. Deraismes*, 165 N. Y. 65; *rev'g*, 29 App. Div. 432, 51 N. Y. Supp. 1097; which *rev'd*, 22 Misc. Rep. 568, 50 N. Y. Supp. 742.

Where real estate is charged with an annuity so far as personal obligations were created by the acceptance of the devise, each devisee is only liable for the same aliquot share of the annuity as is devised to him of the estate. *Dunham v. Deraismes*, 166 N. Y. 607.

Overdue payments.

Where by the express terms of the will annuity payments are charged on the land, payments due and unpaid may be col-

lected from the land and resort need not be had to the estate of the remainderman. *Meeker v. Draffen*, 137 App. Div. 537, 121 N. Y. Supp. 1051; aff'd, 201 N. Y. 205.

¶ 290 Payment of Legacies; Funds Applicable Thereto.

Payment of legacies.

No legacy shall be paid by an executor, or administrator with the will annexed, before the completion of the publication of notice to creditors if such notice be published, or if none be published before the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will or by a decree on an accounting to be sooner paid. Bequests of specific articles of property, other than securities representing money, may be delivered at any time in the discretion of the executor. Whenever a legacy is directed by the will to be sooner paid, or specific property is bequeathed, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or the value of the articles so delivered, with interest thereon or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the will, under which such legacy is paid, be denied probate on appeal or otherwise that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto.

§ 2688, Code Civ. Pro.

Effect of revision. § 2721 amended.

By the amendment legacies are now payable at the completion of the publication of the notice to creditors, or if none be published at the expiration of one year from the grant of letters. Specific articles can now be delivered at any time while under the former section such articles could not be delivered until the expiration of a year. The last part of the former section is omitted as not being consistent with the new rule as to payment.

For proceeding to compel payment of legacy see section 2687 (¶ 302).

When legacy is due.

It is by virtue of this section that interest is charged on legacies, for the decisions have held that interest began to run from the time the legacy became payable, which under the former section was one year after granting letters, changing the former rule, which was one year from date of death. By the amended section, a legacy is payable when the notice to creditors is completely published, and, therefore, interest will begin a reasonable time after that date. See ¶ 294.

Action to recover legacy. See ¶ 301.

If after one year the representatives refuses to pay a legacy on demand, an action may be maintained for the collection of the same.

Payment to guardian of infant.

When a legacy is given to an infant payment must be made to the guardian of such infant, unless the amount is so small that it may be paid to the father or mother under section 2739 (¶ 472).

If no guardian has been appointed it should be paid into court. An ancillary guardian may be appointed for a nonresident infant (see ¶ 99) in which case payment may be made to him.

Payment to incompetent.

A legacy should not be paid to an incompetent person, even where he has not been adjudged to be incompetent, if in the good judgment of the executor he is not of that condition of mind which would make it safe for him to have possession and control of the fund. If there is any question about his condition in this regard, payment should be postponed until the judicial settlement when evidence may be taken, and the direction of the court as to payment may be made.

If it is decided that it is not a proper case for payment to the incompetent, the decree may direct payment to be made to the

committee when appointed or if none be appointed within six months, that the legacy be paid into court.

¶ 291 Payment of Legacies; from What Funds Payable.

It is the duty of the executor to convert the property and securities of the estate into money so that he may have cash on hand to pay the pecuniary legacies. It is not necessary or proper for the executor to postpone payment of pecuniary legacies until a final settlement as is too often done. The authority for the payment of legacies is not obtained from the surrogate but is obtained from the will itself.

If any legacy is directed by the will to be paid before it is due by the terms of section 2688 (¶ 290), the executor may require a bond with two sufficient sureties conditioned that if debts against the deceased duly appear and there are not other assets to pay the same and no property sufficient to pay the other legacies, then the legatees will refund the legacy so paid or such ratable portion thereof with the other legatees as may be necessary for the payment of such debts and the proportional parts of such legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee and that if the probate of the will under which such legacy is paid be denied upon appeal that such legatee will refund the whole of such legacy with interest, to the executor or administrator entitled thereto.

A legacy payable "at the convenience of the executor" does not leave the time of payment to the arbitrary will of the executor but is payable when the condition of the estate warrants payment. *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207.

Where an instalment of a legacy is due, payment should be ordered upon giving the proper bond, and it is not a defense to allege that the legatee has obtained possession of some bonds formerly belonging to the deceased, the possession of which is in litigation. *Matter of Selling*, 5 Dem. 225.

Substitutionary and accumulative.

The repetition of a legacy in the same instrument is substitutionary; the repetition of it by a will and codicil is accumulative. *Matter of Moore*, 131 A. D. 213, 115 N. Y. Supp. 684.

Legacies Are Payable from Personal Estate.

When a person dies leaving a will and personal and real property, his debts and pecuniary legacies bequeathed by the will are to be paid from his personal property, and, in case of a deficiency of personal property, the legacies must abate, unless he charges his real estate with the payment. The charge upon the real estate may be made either by express directions to that effect in the will, or the intention to thus charge it may be implied from the whole will. *Reynolds v. Reynolds*, 16 N. Y. 257, 259.

Personal estate is the natural and primary fund to be first applied in discharge of personal debts and general legacies. *Hoes v. Van Hoesen*, 1 N. Y. 120; *Dunham v. Deraismes*, 29 App. Div. 432, 51 N. Y. Supp. 1097; *Bevan v. Cooper*, 72 N. Y. 317.

Both real and personal estate may be made the fund for payment of legacies.

The personalty is not only the primary fund, but the only one liable for the payment of the general legacies unless they are charged on the realty by express direction, or by necessary implication; such charge, however, may operate in aid of the personalty, furnishing an additional fund for the payment of legacies upon exhaustion of the personalty, or where the two species of property are blended together by the terms of the will, rendering them both liable for payment of legacies *pari passu*. The courts of this State after much vacillation appear now to take the position that this blending of the realty and personal estate in the residuary clause is not sufficient in and of itself to charge the realty, yet it is a circumstance to be taken into consideration in ascertaining the testator's intention, and in connection with the other circumstances may be controlling. *Matter of Spencer*, 8 Misc. Rep. 193, 59 N. Y. St. Repr. 480.

When the personal estate is not exonerated.

Where there is a direction that a devisee shall pay a legacy, such direction is in aid of the primary fund, the personal estate, and not in exoneration of it, unless there is an absolute disposition of all the personal estate of the testator. *Hoes v. Van Hoesen*, 1 N. Y. 120; *Kelsey v. Western*, 2 id. 500.

Intent to have real estate aid personal in paying legacies is shown when there is given a power of sale which has no other use. *Taylor v. Dodd*, 58 N. Y. 335.

Where in a will certain real property is set apart for the payment of debts and the fee thereof given to the executors in trust for that purpose the personal estate is exonerated. *Youngs v. Youngs*, 45 N. Y. 254.

Where the will charges the legacies on the real estate "to the end that they be paid" it was held that the personal estate was not exonerated. *Matter of Marsh*, 75 Misc Rep. 588, 136 N. Y. Supp. 630.

¶ 292 When Bond Should be Required Upon Payment of Legacy to One Who is Given the Use of the Same by Will.

There are some instances where the executor should require from a life beneficiary of a fund or of personal property, a bond upon turning the same over. This requirement does not rest on section 2688 (¶ 290) for its authority, but rather upon equitable principles and the duty which the executor owes to the person or persons ultimately entitled to the principal of the fund, to so protect it, that they may receive it at the termination of the life of the first user.

When a life estate is bequeathed in a sum of money, with remainder over, the legatee is entitled only to the income, and the principal, subject to the life estate, belongs to the remainderman; and unless otherwise directed by the will, it is the duty of the executor either to invest the money and pay the interest to the first legatee during life, and preserve the principal for the re-

maindorman, or, on paying it over to the legatee, to require security from him for the protection of the remainderman in respect to the principal. *Tyson v. Blake*, 22 N. Y. 558. But it is within the power of the testator to dispense with these safeguards, and to confide the money to the legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman, in which case the legatee for life becomes trustee of the principal during the continuance of the life estate. *Smith v. Van Ostrand*, 64 N. Y. 278-281.

In the case of *Livingston v. Murray* (68 N. Y. 485), at page 492, the court, in considering a case where there was a general bequest to A. for life with remainder to B., in a will where executors were appointed, says: "In such a case there is no other trust than the law creates and vests in the executors. They take the legal title to all the personal property. They must convert it into money, pay debts, expenses, and specific legacies if any, and as they are bound to execute all the provisions of the will, they are charged with a duty as to both A. and B. They must give to A. what belongs to him, and then to B. what belongs to him. They cannot discharge their duty by delivering the whole property to A., and thus imperiling the rights of B."

Where executors turn over to a life legatee a legacy in money, it is, generally speaking, their duty to exact from such legatee security for the redelivery of the *corpus* of the legacy to the remaindermen upon the termination of the life estate. If, on the other hand, the executors should turn over to the party having the life estate articles which were bequeathed to such person, they should require from such legatee a written inventory and agreement setting forth his own interest in the property and acknowledging that on his death it belongs to the person or persons designated in remainder. *Matter of McDougall*, 141 N. Y. 21; *Livingston v. Murray*, *supra*; *Matter of Talmage*, 32 App. Div. 10; *aff'd*, 160 N. Y. 704.

If the property is not turned over to the life tenant in the manner hereinbefore specified, then the property must be invested

and the tenant for life paid the income. *Calkins v. Calkins*, 1 Redf. 337; *Matter of Burr*, 48 Misc. Rep. 57.

Payment to a life beneficiary of a part of the fund and taking back a bond for its return or application according to the terms of the will is not larceny. *Moss v. Cohen*, 158 N. Y. 240, rev'g, 15 Misc. Rep. 108, 36 N. Y. Supp. 265, 71 N. Y. St. Repr. 5.

Executors have no right to turn over to the life legatees the *corpus* of the estate with no security but the personal bond of such legatee. *Moss v. Cohen*, 158 N. Y. 240; *Lee v. Horton*, 104 id. 538.

The duty of the executor often depends upon the construction of the will.

Where the will gave the "use and enjoyment, rents, issues, and profits" to a daughter for life—*held*, that the principal ought not to be paid to her without security. *Matter of Roffo*, 51 App. Div. 35, 64 N. Y. Supp. 455.

Held, that it was the intention that the *corpus* should be paid over upon giving the usual bond. *Livingston v. Murray*, 68 N. Y. 485.

Where the will did not give the widow the right to use the *corpus*, but said the estate was to be "used and enjoyed" by her—*held*, that those words were not sufficient to give her the right to use any of the *corpus*, and that she was not entitled to the possession of money without giving security. *Matter of McDougall*, 141 N. Y. 21.

Where the will gave to the wife the use of the estate "with the custody and possession of all personal property"—*held*, that no security should be required. *Matter of Ungrich*, 48 App. Div. 594, 62 N. Y. Supp. 975; *aff'd*, 166 N. Y. 618.

Will gave property in trust "to pay over all the rest and residue" to her sister for her use during her natural lifetime and after her death to be and become the property of her son—*held*, that the sister was entitled to the custody and possession of the fund. *Matter of Weppeler*, 2 Dem. 626.

The will made the following provision for the husband: "to have and use the same, interest and principal, or so much thereof

as he may wish to use during his life," with remainder over — held that the husband was entitled to possession of the property. *Matter of Haskell*, 19 Misc. Rep. 206, 43 N. Y. Supp. 1144.

When paid over, the life beneficiary holds the fund or property in trust.

Where by the terms of the will the *corpus* may be turned over to the life beneficiary he holds the same in trust for the remaindermen. *Smith v. Van Ostrand*, 64 N. Y. 278; *Matter of Weppeler*, 2 Dem. 626.

Where a life use is given a widow in certain property and the executor is directed to turn the same over to the widow, having done so the executor is discharged from all liability and divested of all power concerning it. *Smith v. Van Ostrand*, 64 N. Y. 278.

¶ 293 Right of Retainer Where Legatee Owes Debt to Testator. See ¶ 392.

Where a debt exists from the legatee to testator, the executor is justified in refusing to pay the legacy and in applying it in part satisfaction of the debt. *Smith v. Murray*, 1 Dem. 34. See *Matter of Rudd*, 4 Dem. 335; *Matter of Colwell*, 15 N. Y. St. Rep. 742.

A note against a niece of testator was set off against a legacy although the will stated that all money any legatee might have received from testator in his lifetime should be considered a gift and not an advancement. *Matter of Cramer*, 43 Misc. Rep. 494, 89 N. Y. Supp. 469.

May be retained where Statute of Limitations has run against the debt.

That an executor has an equitable lien upon and the right to retain out of a legacy an amount due from the legatee to the testator, and that this right is unaffected by the fact that such debt is barred by the Statute of Limitations, is well established. *Matter of Foster*, 15 Misc. Rep. 175, 72 N. Y. St. Rep. 140, 37 N. Y. Supp. 36.

On judicial settlement of the executor's accounts he was charged with a judgment and a note held by testator against a legatee

against both of which the six-year statute had run and the right of retainer declared to exist. *Rogers v. Murdock*, 45 Hun, 30, 9 N. Y. St. Repr. 660.

When the legatee denies the debt.

Before the powers of the Surrogates' Courts were so enlarged that the surrogate has jurisdiction to determine any question between the parties to a proceeding which it is necessary to determine in order to make a complete decree in the matter, the court was without power to try the issue between the executor and legatee, as to whether an alleged debt of the legatee to the testator was valid, so that he might deduct the same from the legacy. *Matter of Colwell*, 15 N. Y. St. Repr. 742; *Matter of Foster*, 15 Misc. Rep. 175, 72 N. Y. St. Repr. 140; *Matter of Schmidt*, 58 N. Y. Supp. 595.

Because of this incomplete jurisdiction the executor either lost the benefit to the estate of the collection of the debt, or a long delay ensued while the issue was being tried in another court.

Under the present jurisdiction, all the interested parties being in court upon the judicial settlement, the issue may be disposed of, either with or without a jury as the parties elect.

Right to retain income of trust fund. See ¶¶ 339, 341.

While it is well settled that a debt due from a legatee may be retained out of a legacy, there seems to be some difference of opinion whether the income from a trust fund established by the testator for the benefit of such debtor can be retained and applied upon the debt. In *Matter of Foster* (38 Misc. Rep. 347, 77 N. Y. Supp. 922), such retainer was allowed upon the judicial settlement of the accounts of the executors, the surrogate saying: "The principle upon which the right of retainer depends must be the same whether the legacy is general, or is the income of a fund placed in trust."

The same question arose later on a motion before the surrogate to compel a trustee named in the will who was also the executor to pay over the income of the trust fund to the debtor. In that case

(*Matter of Bogert*, 41 Misc. Rep. 598, 85 N. Y. Supp. 291), the surrogate felt constrained to take the opposite view and said: "It stands conceded that this income is exempt from the attack of a creditor, yet it must be remembered that an executor of an estate simply stands in the light of a creditor, and if the estate can reimburse itself by retaining this income until the debt is paid then the estate would have a preference over the ordinary creditor. * * * The theory of retainer is that it is the executor's duty to collect all debts due the estate, and that such debts are assets due the estate which it is the executor's right to retain and offset against a legacy, but a trustee has no such powers. His duties are confined exclusively to investing and caring for the trust funds and applying the same as directed by the trust."

The reasoning in the *Bogert* case was approved in *Matter of Knibbs* (45 Misc. Rep. 83, 91 N. Y. Supp. 697). In that case the executors and trustees asked to retain the income of a trust fund to pay judgments held by them against the legatee for costs granted them in litigation brought by the legatee, and such request was denied. This decision was affirmed in 108 App. Div. 134, 96 N. Y. Supp. 40.

¶ 294 From What Time Legacies Draw Interest.

The general rules, in regard to the payment of legacies, where no time is fixed or indicated by the will, together with the interest thereon, may be stated thus:

1. Specific legacies are considered as severed from the bulk of the testator's property, by the operation of the will, from the death of the testator, and as specifically appropriated, with the income and the increase thereof, for the benefit of the legatee, from that period; and interest is computed thereon from the death of the testator.

2. By statute general legacies are not payable until one year from the issuing of letters testamentary, or the earlier completion of the advertisement for creditors, and they do not begin to draw interest until that time.

3. A legacy given to a widow, in lieu of dower, where the testator died seized of real estate of which she was dowable, draws interest from the death of the testator.

4. A legacy given in satisfaction of a debt draws interest from the testator's death.

5. A legacy given to a child of the testator, or one to whom the testator has placed himself *in loco parentis*, will, if such child is an infant, and is not otherwise provided for by the testator's bounty, or in some other way, draw interest from the testator's death, to provide means for the support and maintenance of such infant child; the amount of interest for the first year to be fixed by the court according to circumstances, not, however, to exceed the amount necessary for the proper support, education, and maintenance of such infant during the year succeeding the testator's death.

6. An annuity draws interest from the death of the testator, in the absence of any direction contained in the will, to the contrary.

7. A general legacy of the use and income of a specific fund, bequeathed to one for life, with remainder of the principal fund over to another, does not draw interest, as interest, but participates in the income earned by the estate from the date of death of decedent to the time of payment of such principal sum to the trustee.

But where the gift is of a specific sum to a trustee for the use of another, and the gift is not of the use and income, but of the fund, such legacy will not participate in income, but will draw interest after one year from the grant of letters. *Matter of Stanfield*, 135 N. Y. 292. See also ¶ 296.

8. A life tenant of the residue of the testator's estate will be entitled to the net earnings of such residue from the testator's death, after providing for the payment of debts and other legacies. *Carr v. Bennett*, 3 Dem. 433, 458; *Matter of McKay*, 5 Misc. Rep. 123, 25 N. Y. Supp. 725; *Thorn v. Garner*, 113 N. Y. 198.

It was settled by the Court of Appeals under former section

2721 of the Code, that since general legacies were not payable until one year after grant of letters, such a legacy did not begin to draw interest until that time. *Matter of McGowan*, 124 N. Y. 526, rev'g, 32 N. Y. St. Rep. 226. This case overrules *Carr v. Bennett* (3 Dem. 459); *Dustan v. Carter* (3 Dem. 149); *Clark v. Butler* (4 Dem. 378); *Matter of Gibson* (24 Abb. N. C. 45); *Fisher's Estate* (1 Bradf. 335), and other cases in so far as they hold that such a legacy begins to draw interest one year after the death of testator.

Interest on general legacies.

Under former section 2721 legacies were payable one year after letters were granted, but under the present section 2688 (¶ 290), they are payable at the termination of the publication of notice to creditors, or at the end of one year from grant of letters, if no notice has been published.

The court should not hold that interest begins to run from the last day of the six months allowed for presentation of claims, for that would not give the representative a reasonable time to ascertain the amount of the debts and make payment of the legacy.

Inasmuch as under section 2726 (¶ 369) a proceeding for a compulsory judicial settlement cannot be begun until fifteen days after the time in which to present claims has expired, that time would be a fair date to fix, in ordinary cases, for the beginning of interest on general legacies. Under some circumstances, however, a later date should be fixed, in the discretion of the surrogate, according to the facts of each case.

The revisers intentionally omitted to fix the exact date when interest should begin, believing that it would be more equitable to leave the question, if not agreed upon by the parties, to be determined by the court under the facts of each case.

CASES DECIDED UNDER THE ONE YEAR RULE.

Bear in mind the change, while reading these cases for the application of the principles.

A legacy bears interest at the legal rate from the time it becomes payable, and the fact that the money of the estate has not been invested at the legal rate of interest does not change the rule. *Hoffman v. Penn Hospital*, 1 Dem. 118.

Whether the assets of the estate have been fruitful or unproductive does not affect the right of the legatee. He is in the same position as a creditor and entitled to be awarded interest at the legal rate for such time as he is kept out of his legacy after one year from the granting of letters. *Matter of Austin*, 45 N. Y. Supp. 984; *Clark v. Butler*, 4 Dem. 378.

Legacies are payable one year from granting letters and bear interest after that time, unless directed by the will to be sooner paid. In this case it was *held* that interest from date of death was not due. *Bradner v. Faulkner*, 12 N. Y. 472.

An executor who is a legatee and has funds in hand sufficient to pay his legacy cannot have interest upon the same. *Matter of Gerard*, 1 Dem. 244.

A general legacy of stock or bonds does not carry the interest or dividends accruing before delivery to the legatee. *Tift v. Porter*, 8 N. Y. 516.

A contest over a will was being made in the interest of one who was a legatee. Upon that failing the legatee demanded interest on the legacy — *held* that she was entitled to interest only from the time the contest was dismissed. *Foster v. Wetmore*, 37 N. Y. St. Repr. 667, 14 N. Y. Supp. 194.

A bequest to be equivalent to the rent of certain premises for four years — *held* not to be due and not to draw interest until the end of the four years. *St. F. X. College v. Doherty*, 5 Redf. 526.

Rule for computing interest on legacy where partial payments have been made.

The rule to be applied was settled nearly a hundred years ago, in *Connecticut v. Jackson* (1 Johns. Ch. 17). It was stated as follows: "The rule for casting interest, when partial payments have been made, is to apply the payment in the first place to the

discharge of the interest then due. If the payment exceeds the interest the surplus goes toward discharging the principal and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due and then the surplus is to be applied toward discharging the principal, and interest is to be computed on the balance as aforesaid." It has since been followed. *Young v. Hill*, 67 N. Y. 162; *Peyser v. Myers*, 135 id. 599; *Matter of Erving*, 103 App. Div. 501, 92 N. Y. Supp. 1109.

When legacy begins to draw interest which is to be paid from proceeds of sale of real estate after death of life tenant, or after falling in of life estate.

The theory upon which interest is allowed by law on general legacies is because of the deprivation of the same beyond a period when it is payable, either by the terms of the will or the time fixed by statute. It follows, therefore, that interest is payable from the time when a legacy ought to be paid to the time when actual payment is made, unless the will appoints and fixes a different time. The testator may upon proper directions annex interest on the principal from any point of time he desires, but in the absence of such direction the rule is as stated.

When pecuniary legacies are payable after the intervention of a life estate out of the proceeds of the sale of real and personal property, the law does not require a sale instanter, but a reasonable time will be allowed for the conversion of assets into a fund from which to pay, and interest will not be given until the sale, since the legatees suffer no deprivation or damage, which is the basic principle upon which interest is allowed; nor can interest be demanded until interest is payable, which would be after the sale of the real property, since the funds for the payment of the legacies were to be derived from the sale of lands, and in no

other manner. *Matter of Schabacker*, 46 Misc. Rep. 219, 94 N. Y. Supp. 80.

Legacy payable from proceeds of sale of real estate becomes payable when sufficient sum is realized from such sales and interest begins from that time. *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207. But see *Matter of Maine*, 62 Hun, 334, 42 N. Y. St. Repr. 195.

After termination of life estate.

Where legacies are given which can be paid partly from present property and partly from the proceeds of an outstanding life or contingent estate, interest will be allowed where the will does not show an intention to postpone payment. *Matter of Rutherford*, 196 N. Y. 311; rev'g, 133 App. Div. 89.

At the time the will went into effect and for some years thereafter the estate was subject to a life estate in another. *Held* that the legacies were not due until the death of the life tenant and did not begin to draw interest until that time. *Wheeler v. Ruthven*, 74 N. Y. 428.

Allowed from date of death of life tenant. *Matter of Runk*, 55 Misc. Rep. 478, 106 N. Y. Supp. 851; *Matter of Hussey*, 67 Misc. Rep. 32; *Matter of McNamee*, 78 Misc. Rep. 324, 139 N. Y. Supp. 304.

Estate to be converted or amount of legacy to be determined.

Sometimes the amount of the legacy is to be determined by some method or is dependent upon some contingency. In such a case it may not begin to draw interest until the amount thereof can be ascertained. *Matter of Frankenheimer*, 130 App. Div. 454; aff'd, 195 N. Y. 346.

Where a trust was to be made up of the proceeds of certain property to be converted into cash — *held* that interest did not begin to run until such conversion, if made within a year. *Foster v. Wetmore*, 37 N. Y. St. Repr. 667, 14 N. Y. Supp. 194.

When letters issue.

“Letters testamentary” or “of administration” include temporary letters, and so, where such letters have been granted pending proceedings for the probate of a will, interest upon a general legacy begins to run one year after the date of the issue of such letters. *Matter of McGowan*, 124 N. Y. 526; rev’g, 32 N. Y. St. Repr. 226.

¶ 295 Interest on Legacy to Widow in Lieu of Dower, and to Children of Testator.

Whether a legacy to a widow in lieu of dower shall bear interest from date of death of testator, or from one year thereafter, is often an important question, and has lately been discussed in two cases seemingly holding opposite views. These cases are: *Matter of Barnes*, 7 App. Div. 13; aff’d, 154 N. Y. 737, and *Stevens v. Melcher*, 80 Hun, 514; aff’d, 152 N. Y. 551.

In the *Barnes* case the testator gave to his widow absolutely a legacy of \$150,000 “in lieu of all other interest, dower, or distributive share, of my estate.” Mr. Justice Ingraham, writing for the court, after considering a number of cases in this and other States, reached the conclusion that where a gross sum is given to a wife, in lieu of dower, over which she has the absolute right of disposition, such gross sum takes the place of the dower interest; and such legacy does not become due and payable or draw interest until the expiration of one year from the date of the issue of letters testamentary, in the absence of a contrary intention of the testator, plainly expressed in the will, that the legacy should be paid before the time fixed by law for its payment.

The distinction between these cases is apparent and plain. The language used by the testator in the *Stevens* case, “To be paid to her out of my estate as soon as practicable after my decease,” clearly evinces an intention on the part of the testator to make the legacy payable before the expiration of the year, removed the case from the operation of section 2721 (now § 2688)

of the Code of Civil Procedure, and explains the statement of Presiding Justice Van Brunt in the *Barnes* case that "interest is a penalty imposed because of a default in the payment of money which is due." The testator's estate being such that it was "practicable" to pay the legacy immediately on his decease, it then became due and payable, and interest from that time was properly allowed. These facts make clear the reasons which led the Court of Appeals to negative the contention of appellant's counsel in the *Barnes* case that its decision in the *Stevens* case furnished reasons for a reargument and reversal. *Matter of Martens*, 106 App. Div. 50, 94 N. Y. Supp. 297.

A legacy to a widow in lieu of dower draws interest from the death of testator. *Parkinson v. Parkinson*, 2 Bradf. 77; *Seymour v. Butler*, 3 id. 193; *Stevens v. Melcher*, 80 Hun, 514, 62 N. Y. St. Repr. 599; aff'd, 152 N. Y. 551; *Hepburn v. Hepburn*, 2 Bradf. 74; *Bullard v. Benson*, 1 Dem. 486.

To entitle the widow to the benefit of this rule it must appear expressly or by fair inference from the will itself that the legacy is given in lieu of dower. *Matter of Williams*, 1 Redf. 208.

A legacy to a testator's widow in lieu of dower carries interest from the testator's death although its value exceeds that of the dower interest. *Matter of Combs*, 3 Dem. 348.

A legacy to widow in lieu of dower will not begin to draw interest until she elects to receive it in lieu of dower. *Matter of Hodgman*, 69 Hun, 484, 52 N. Y. St. Repr. 727; aff'd, 140 N. Y. 421.

Almost one-half of testator's large estate was given to the widow, and it did not appear that testator left any real estate, and it was *held* that it was not a case for allowance of interest from the death of testator. *Matter of Barnes*, 7 App. Div. 13; aff'd, 154 N. Y. 737.

Widow being given legacy in lieu of dower — *held* to be entitled to interest from date of testator's death. *Matter of Benson*, 96 N. Y. 499.

An antenuptial agreement gave a widow \$4,000 and interest

from date of death in lieu of dower. By his will testator increases such payment to \$10,000 — *held* that the whole sum drew interest from date of death. *Matter of Bostwick*, 119 App. Div. 455; *rev'g*, 49 Misc. Rep. 186.

It was said in *Matter of Bostwick* (49 Misc. Rep. 186), that it is now well settled that an absolute legacy to a wife in lieu of dower does not draw interest until one year from the issuance of letters testamentary, and it is only where the interest of a trust fund is given in lieu of dower that it runs from the testator's death. *Matter of Barnes*, 7 App. Div. 13; *aff'd*, 154 N. Y. 737.

When legacy to a child begins to draw interest.

A legacy to an adopted daughter for whom no provision was made for immediate support was held to draw interest from date of death. *Matter of Williams*, 1 Redf. 208.

Legacy of \$1,000,000 to an adult son in feeble health — *held* did not draw interest from date of death of testator. *Thorn v. Garner*, 113 N. Y. 198.

A legacy to a grandchild to whom the testator stood *in loco parentis*, said legatee being an infant and without other property, draws interest from date of testator's death. *Brown v. Knapp*, 79 N. Y. 136.

Adopted children being left the income of certain funds until they arrived at age are entitled to that income or interest from date of death of testator. *Matter of Devlin*, 1 Tuck. 460.

No evidence that the grandfather had assumed the relation of a parent, and interest from death not allowed. *Harward v. Hewlett*, 5 Redf. 330.

Real property converted is so converted as of date of death, and interest will be allowed to minor adopted daughter from date of death. *Keating v. Burns*, 3 Dem. 233.

Legacy to daughter payable "as soon as practicable" after testator's death draws interest as a general legacy. *Vernet v. Williams*, 3 Dem. 349.

Upon a legacy to an adopted daughter payable when she became twenty-five years of age, interest was not allowed until she reached that age. *Lyon v. I. S. Assn.*, 127 N. Y. 402.

Legacy to a child married and with grown sons will not draw interest on the ground of needing additional income for a better style of living. *Morgan v. Valentine*, 6 Dem. 18, 19 N. Y. St. Repr. 515.

The test is not whether the child has any other property applicable to its maintenance, but whether any other provision is made for it in the will. *Neder v. Zimmer*, 6 Dem. 180, 20 N. Y. St. Repr. 353; *Brown v. Knapp*, 79 N. Y. 136-141.

¶ 296 From What Time a Legacy of Income Draws Interest or Carries the Accruing Income. See ¶ 294.

The beneficiary is entitled to interest on a legacy left for his use, from the date of testator's death, where it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing interest at the time of his death. *Cooke v. Meeker*, 36 N. Y. 15; approved in 135 id. 292.

A gift of the income of an estate gives the income from the testator's death. *Matter of Slocum*, 60 App. Div. 438; aff'd, 169 N. Y. 153.

Where the estate is sufficient for the liquidation of debts and other charges, and is so invested as to be productive of income from the death of the testator, a bequest of income to a legatee for life must be construed to invest him with a title to such income from the date of the testator's demise, unless there is some provision in the will from which a contrary intention is to be inferred. *Matter of Stanfield*, 135 N. Y. 292. In *Cooke v. Meeker* (36 N. Y. 15), the court say: "The authorities would seem abundant, therefore, to sustain the doctrine, that when a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death." See

also *Matter of Baker*, 57 App. Div. 44, 68 N. Y. Supp. 44; *Powers v. Powers*, 49 Hun, 219, 1 N. Y. Supp. 636, 16 N. Y. St. Repr. 770; *Conklin v. Clark*, 48 Misc. Rep. 432, 96 N. Y. Supp. 914.

Legacy of 5 per cent. on a fixed sum to be invested was directed paid from the residuary estate when no interest had been earned. Redress for the residuary legatees was said to be by them against the executor. *Matter of Wolff*, 79 Misc. Rep. 177, 140 N. Y. Supp. 590.

Income of a trust fund given for benefit of a sister of testator — *held* that interest began on death of testator. *Matter of Wood*, 1 Dem. 559.

A legacy in trust for the support and education of a granddaughter draws interest from testator's death. *Nahmens v. Copely*, 2 Dem. 253.

Where the whole estate was given to the executor to invest and pay the income to wife and child, and most of such estate was invested in a business, the income from such business from the death of testator was held to belong to the beneficiary and not to the remainderman. That it was income not *corpus*. *Matter of Slocum*, 169 N. Y. 153.

Where a gift is made of the income of an estate the income is to be reckoned as commencing immediately upon the testator's death. Testator was member of a partnership and his interest was left in the firm for a time after his death — *held* that all the profits thereon went to the life tenant. *Matter of Rogers*, 37 Misc. Rep. 54; *aff'd*, 80 App. Div. 362.

Where a will directs the income of testator's property to be paid to certain persons for life, remainder over, and that certain property be converted, the income for the first year goes to the life tenant and not to the estate. *Austin's Will*, 60 App. Div. 445, 69 N. Y. Supp. 1036; *aff'd*, 169 N. Y. 153.

Where the income from an estate or of a designated portion thereof is given to a legatee for life he becomes entitled to whatever income accrues thereon from and after the death of

testator, unless there is some provision in the will from which a contrary intent can be inferred. *Matter of Stanfield*, 135 N. Y. 292; aff'g, 64 Hun, 277, 46 N. Y. St. Repr. 346, 8 N. Y. Supp. 913.

Where the personal estate was not sufficient to pay the debts and the real estate was unproductive, interest from testator's death was not allowed the mother who was given the life use of the estate. *In re O'Hara's Exrs.*, 19 Misc. Rep. 254, 44 N. Y. Supp. 222.

Trust fund created with income to H.—That fund in fact was made up of property held by deceased in his lifetime which was earning 8 per cent.—*held* that the beneficiary was only entitled to such rate of interest as might be reasonably earned thereon. *Southgate v. Cont. T. Co.*, 74 App. Div. 150; aff'd, 176 N. Y. 588, no opinion.

Testator provided for a fund to be made up of certain securities and held by trustees—that such fund should be divided into three parts, and from one of such third parts he provided that in a certain event certain persons should have a specified portion thereof—*held* that such legacies were general and bore interest from the death of the person who had the life use thereof. *Smith v. Lansing*, 24 Misc. Rep. 566, 53 N. Y. Supp. 633.

¶ 297 **When the Payment of a Legacy is or is Not Charged upon Land Devise.** See ¶ 247.

The primary rule is that where the personal estate is insufficient to pay the general legacies they must abate proportionately, and that no recourse may be had to the real estate to make up the deficiency unless the will indicates an intention upon the part of the testator that the real estate should be so charged. This rule is so familiar as to require no citation of any of the numerous decisions in which it has been stated. As the question is one of testamentary intention, the courts have been diligent in searching out the testator's intent, not exclusively from the words of the will itself, but from such words weighed in the light of the sur-

rounding circumstances when the will was made. *Hoyt v. Hoyt*, 85 N. Y. 142; *McManus v. McManus*, 179 id. 338; *Lediger v. Canfield*, 78 App. Div. 596, 79 N. Y. Supp. 758. While all the cases declare that, in the absence of an express charge in the language of the will, no charge will be implied unless it can be fairly or satisfactorily inferred, the circumstances under which such inference has been made have varied quite considerably. The cases in which this question has arisen have been very numerous and the expressions of judicial opinion too frequent to require repetition here. Running throughout many of these cases we find at times a strong tendency upon the part of the courts to charge the legacy upon the lands in favor of legatees who were of the blood of the testator and thus presumed to be "the natural objects of his bounty," and we find this tendency to be less strong in cases of legatees who were strangers in blood. The general argument upon which charges have been inferred is stated as follows: It is to be presumed that the will was drawn honestly and in good faith and that when the testator provided a legacy he intended that it should be paid. *Bevan v. Cooper*, 72 N. Y. 317; *Hoyt v. Hoyt*, *supra*; *McManus v. McManus*, *supra*. This so-called presumption is not absolute, as otherwise it would destroy the primary rule, but it comes into play only when the circumstances surrounding the making of the will give fair cause for its rise. Hence the courts have always considered as of almost controlling importance on the question of testator's intent the fact whether or not when he made his will his personal estate was sufficient to pay in full or in part the legacies therein expressed. For, as was frequently argued, if, when he made the will and specified the legacies, he knew that he had not sufficient personal property to pay them, he should be deemed to have intended to subject his residuary real estate to the burden of payment, or otherwise he must be deemed to have made his will a mere trick upon the legatees. To give any room for an indulgence in this argument for the purpose of defeating the primary rule, the court must have before it quite satisfactory evidence of the fact upon which the

argument is based. *McGoldrick v. Bodkin*, 140 App. Div. 196, 125 N. Y. Supp. 101.

Effect of residuary clause.

Where, in a will, general legacies are given, followed by a gift of all the rest and residue of the real and personal property of the testator, by a residuary clause in the usual form and nothing more, it must now be regarded as the established rule in this State that the language of the will alone, unaided by extrinsic circumstances, is insufficient to charge the legacies upon lands included in the residuary devise. This was clearly the opinion of Chancellor Kent in the leading case of *Lupton v. Lupton* (2 Johns. Ch. 614), as appears by his comment on the case of *Brudenell v. Boughton* (2 Atk. 268), although his judgment in that case rested in part upon the circumstance that in the will then under consideration, there was a prior devise which easily permitted an interpretation "*reddendo singula singulis*," of the residuary clause. In *Hoyt v. Hoyt* (85 N. Y. 142), Folger, C. J., referring to *Lupton v. Lupton* and other cases, justly stated that they asserted the doctrine that, "unaided and alone, the words that make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate," but the question was not passed upon in that case. The courts, however, have held that a gift of general legacies, followed by a general residuary clause, is not inconsistent with an intention on the part of a testator to charge the legacies on the land. They have, therefore, permitted extrinsic circumstances to be considered for the purpose of ascertaining the actual intention of the testator and in some cases, by reading the language of the will in the light of the circumstances, have inferred an intention to charge legacies on the land and given effect to such intention, although the language considered, independently of the circumstances, would not alone justify such an inference.

The cases of *Wiltsie v. Shaw* (100 N. Y. 191) and *McCorn v. McCorn* (id. 511), illustrate very clearly the attitude of the

Court of Appeals upon the subject. Both were cases substantially of wills giving general legacies, followed by the usual residuary clause. In each the question was whether the legacies were charged on the land. In *Wiltsie v. Shaw*, it appeared that the testator left a large personal estate, ample for the payment of debts and legacies, and no other circumstance appearing, it was held that a legacy given by the testator in his will, in trust for a son, was not a charge on the lands, which passed to the testator's daughter under the residuary clause. In *McCorn v. McCorn*, the legatees were the wife and son of the testator, and the gift of the legacies was followed by the usual residuary clause, under which all the testator's real estate passed to four other children. It appeared that the will was made the day before the testator's death, and that his personal estate was insufficient to pay his funeral expenses. The legacies to the testator's wife and son were mere pretenses "unless meant to be a charge on the real estate." Under these circumstances the court held that the legacies were intended to be charged on the realty, and sustained the claim of the legatees.

The cases in this State establish these two propositions: First, that general language in a will, giving legacies, followed by the usual residuary clause, is alone insufficient to charge the legacies on the realty; and, second, that such language will justify such charge if it is made to appear by extrinsic circumstances, such as may under the rules of law be resorted to, to aid in the interpretation of written instruments, that it was the testator's intention that the legacies should be charged on the land. The rule in England and in some of the States in this country and in the Supreme Court of the United States is different from the rule in this State. *Brill v. Wright*, 112 N. Y. 129.

The mere making of a provision for the payment of debts or legacies out of the real estate does not discharge the personalty. There must be an intention not only to charge the realty, but to exonerate the personalty. *Hoes v. Van Hoesen*, 1 N. Y. 120.

Where a testator had disposed of all his personal estate by de-

posits in trust, and then gave legacies, etc., by his will, it was *held*, that such legacies were charged upon his real estate. *McManus v. McManus*, 179 N. Y. 338; *aff'g*, 86 App. Div. 240.

Legacies may be charged on real estate without express direction in the will, if the intention of the testator so to do can be fairly gathered from all the provisions and extraneous circumstances. *Hoyt v. Hoyt*, 85 N. Y. 142.

Will made day before death — legacies to wife and one son, residue to his children — he had no surplus of personal estate — *held*, that the legacies were charged on the real estate. *McCorn v. McCorn*, 100 N. Y. 511; *Richardson v. Richardson*, 145 App. Div. 540, 129 N. Y. Supp. 941.

Insufficiency of personal estate and the investment of some of it in real estate after the making of the will — *held*, to make legacy a charge on real estate. *Briggs v. Carroll*, 117 N. Y. 288; *aff'g*, 50 Hun, 586; *Irwin v. Teller*, 188 N. Y. 25; *aff'g*, 115 App. Div. 17, 101 N. Y. Supp. 853.

One thousand dollars personal and \$4,000 legacies — *held*, legacies charged on real estate. *Matter of Pettit*, 6 Dem. 391, 13 N. Y. St. Repr. 184.

“This conclusion (to charge the legacies) is not impaired by the fact that the property devised and bequeathed to the daughters was so devised and bequeathed subject to the payment by each of an annuity to Elisha, which the testator directed each of them to secure by setting apart “out of the personal property hereby bequeathed to her the sum of \$2,500, and invest the same and hold it in trust” for his benefit, as that provision related only to the annuity and not to the gift over of the principal to the next of kin of Elisha.” *Irwin v. Teller*, 115 App. Div. 23; *aff'd*, 188 N. Y. 25.

Personal estate exhausted by widow.

Where the will gave the use of all the estate to the widow with the right to use the principal and she did so use it, so that there was no personal estate to pay legacies it was *held* that the

legacies were charged upon the land. *Smith v. Bush*, 59 Misc. Rep. 648, 111 N. Y. Supp. 428.

Where legacies are given "if there is that for them when I and my wife get done with the property"—*held*, charged on real estate. *Hogan v. Kavanaugh*, 138 N. Y. 417.

Legacies not charged.

Except for extraordinary expenses of the estate there would have been enough personal estate to pay all debts and legacies—*held*, legacy not charged on real estate. *Brill v. Wright*, 112 N. Y. 129.

Legacies of \$2,000. At death personal amounted to only \$500—investment having been made in real estate after making the will—*held*, legacies not charged on real estate. *Morris v. Sickly*, 133 N. Y. 456.

Will read, "All the rest of my property, after paying all the legacies and my lawful debts, I give, together with my farm to my son J." If the executor had collected the outstanding debts, the personalty would have sufficed to pay the legacies. *Held*, that they were not charged on the real estate. *Purdy v. Purdy*, 36 App. Div. 535, 57 N. Y. Supp. 166.

Legatees whose shares of the personal estate of the testator have been wasted by the executor have no lien upon the real estate devised to such executor to make good their loss. *Wilkes v. Harper*, 1 N. Y. 586.

Evidence of intention of testator to charge legacy on land may be considered.

When trying to determine whether the testator charged legacies upon the real estate or upon the devisee, extrinsic facts may be considered. The general rule of evidence as to the nonintroduction of extrinsic facts has been construed very liberally when applied to such an intention and the courts have given weight to such facts as might be properly taken into consideration in each particular case and, therefore, the amount of his personal estate as compared with the amount of the legacies; and the fact that the

testator did not specifically devise his real estate; and the fact that the legatees were minors and that there was a direction in the will to pay them the interest on their legacies half yearly have all been taken into consideration. *Matter of Pettit*, 6 Dem. 391, 13 N. Y. St. Repr. 184.

The intention and purpose of the testator to be determined was that which was found to exist at the time of the execution of the will and cannot be varied or changed by any after-occurring events. *Morris v. Sickly*, 133 N. Y. 456. See also 137 id. 604.

Whether a legacy is charged upon the real estate of a decedent is always a question of the testator's intention. Primarily, the language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of the language employed and help to disclose the actual intention are also to be considered. *Le Fevre v. Toole*, 84 N. Y. 95; *Hoyt v. Hoyt*, 85 id. 142; *Scott v. Stebbins*, 91 id. 605; aff'g, 27 Hun, 335; *McCorn v. McCorn*, 100 N. Y. 511, 513.

When extrinsic evidence not competent.

In a will which does not devise real estate, but gives certain money legacies, it is improper to receive evidence of extrinsic facts, since, there being no mention of real estate in the will there is nothing to be explained or construed. *Fries v. Osborn*, 190 N. Y. 35; rev'g, 117 App. Div. 917.

¶ 298 Effect of Non-Exercise of Power of Sale; Lapse of Legacy.

An imperative power of sale not exercised may become merged in the fee.
See ¶ 306.

The imperative power of sale not having been exercised, the beneficiaries of the proceeds of the power of sale may claim the land itself, and the power of sale will be held to have merged in the fee. *Matter of Rathyn*, 115 App. Div. 644, 101 N. Y. Supp. 289.

In *Forman v. Marsh* (11 N. Y. 544, 549), the court says: "It is a general rule that where equity impresses a different quality

upon property from that which it has in fact, such impression ceases whenever the possession of the estate and the right to it in each quality meet in the same person; that is, when there is no other person than the one who has the actual possession, who has an equitable interest in retaining the fictitious character of the estate. Thus, when real uses have been impressed upon personal property, and the personal fund and the uses come together in the same person, the uses are considered as discharged and merged, for there is no person to call for their application."

Where the exercise of a power of sale depends upon the consent of another, and has not been exercised, title acquired from the remainderman is superior to that from the trustee. *Wells v. Brooklyn U. E. R. R. Co.*, 121 App. Div. 491, 106 N. Y. Supp. 77; aff'd, 193 N. Y. 641.

Power of sale not exercised — land retained its original character and descended to heirs. *Gourley v. Campbell*, 66 N. Y. 169.

Effect of lapse of legacy.

Devise in trust with legacy charged on the land and trustee directed to pay the same, the legatee died before testator — *held*, that the legacy lapsed and the land was discharged from its payment. *Matter of Smith*, 33 N. Y. St. Repr. 586, 11 N. Y. Supp. 783; *Kerr v. Dougherty*, 79 N. Y. 327; dist'd, *Matter of Benson*, 96 id. 499.

Descends subject to power of sale or other burden.

A person who takes as heir-at-law premises which descended to him as intestate property by reason of the failure of the testator to make a valid disposition thereof by his will, takes such property subject to any burden imposed thereon by the necessity of carrying out to the best advantage the valid provisions of the will. *Downing v. Marshall*, 4 Abb. Ct. App. Dec. 662.

Effect of power of sale.

The fact that the will contains a power of sale which to become useful must be employed to obtain funds to pay legacies raises a

strong presumption that legacies are charged upon such fund. *Taylor v. Dodd*, 58 N. Y. 335; *Kalbfleisch v. Kalbfleisch*, 67 id. 354.

It is a natural inference that a power of sale is given for the purpose of raising money to pay legacies. *Hoyt v. Hoyt*, 85 N. Y. 142.

Where testator after making his will invested nearly all his personal estate in real estate, and there was a power of sale—*held*, that a legacy to the son was charged on the real estate. *Scott v. Stebbins*, 91 N. Y. 605; *aff'g*, 27 Hun, 335.

¶ 299 Proceeds of Sale to Pay Debts or Legacies Remain Real Estate and Pass as Such; Election to Take the Land.

“The real property within this State passes under the will and is controlled by our law. The power to sell for the purpose of paying legacies is valid. When so sold the proceeds become assets for the payment of debts and expenses of administration, and any deficiency of personalty for such purposes may be supplied from such proceeds. *Matter of Bolton*, 146 N. Y. 257; *Cahill v. Russell*, 140 id. 402. The doctrine of equitable conversion cannot be invoked to require the proceeds of such sale to be treated as personalty at the time of the death of the testator, and, therefore, to pass to the persons claiming against the will and as heirs-at-law. The equities that required the conversion were the equities of the persons for whose benefit the sale was directed, and the sale was lawful only in order to satisfy their claims. So far as all other persons are concerned there was no equitable conversion. The proceeds of the sale will, therefore, be paid pursuant to the directions and wish of the testator as set forth in his will.” *Matter of Barandon*, 41 Misc. Rep. 380, 383, 84 N. Y. Supp. 937; *Matter of Broderick*, 148 N. Y. Supp. 541.

Proceeds of real estate sold under power to sell to pay legacies are personal estate to the extent of the legacies, but the surplus over the legacies not disposed of by the will should be distributed

as real estate. *Matter of Weinstein*, 43 Misc. Rep. 577, 89 N. Y. Supp. 535; *Parker v. Linden*, 113 N. Y. 28.

A gift of land with power of sale in executors differs from a gift of the proceeds of the sale of land; in the former case the proceeds remain real estate, and in the latter case they become personal estate. *Matter of McComb*, 117 N. Y. 378; *Glacius v. Fogel*, 88 id. 434; *Hood v. Hood*, 85 id. 561; *Kinnier v. Rogers*, 42 id. 531.

The real estate may be so situated as to require a sale of all of it in order to execute the valid portions of the will, and thus it will be turned into money in fact, but for the purposes of disposition under the statute as intestate property it will retain its character as real estate. *Bender v. Paulus*, 118 App. Div. 23, 105 N. Y. Supp. 240; aff'd, 197 N. Y. 369.

Rents received before sale. See ¶ 245.

Where legacies are charged upon the land and a power of sale is given, rent received may be applied to the payment of the legacies. *Matter of Kouwenhoven*, 63 Misc. Rep. 161, 118 N. Y. Supp. 502; aff'd, 127 N. Y. Supp. 1128.

Where a sale must be had before any legacies are paid, and the persons entitled to the residue are to share in it only as cash, the rents received before a sale is had may be treated as assets for the payment of debts in the absence of sufficient personal estate. *Foersch v. Schmitt*, 55 Misc. Rep. 608, 106 N. Y. Supp. 935.

Beneficiaries May Elect to Take the Land. See ¶ 321.

Where real estate is converted into personal estate by a power of sale which has been exercised, the beneficiaries, being of full age, may elect to have a reconversion into realty and to take it as land. *Greenland v. Waddell*, 116 N. Y. 234.

Where there is a conversion of realty into personalty the beneficiaries cannot in all cases have the right of election to take the land. *Smith v. A. D. Farmer T. Co.*, 16 App. Div. 438, 45 N.

Y. Supp. 192; rev'g, 18 Misc. Rep. 434, 41 N. Y. Supp. 788; which mod'd, 17 Misc. Rep. 311, 40 N. Y. Supp. 356.

A slight expression of intention is sufficient to show an election on the part of those interested to take the land and to cause a reconversion. *Prentice v. Janssen*, 79 N. Y. 478; aff'g, 14 Hun, 548; *Hayes v. Kerr*, 19 App. Div. 91, 45 N. Y. Supp. 1050.

Power of sale defeated by conveyance.

Conveyance of the land by the beneficiaries held to extinguish the power of sale. *Hetzel v. Barber*, 69 N. Y. 1.

A conveyance by the remaindermen of their interest in lands which were subject to a power of sale, indicates an intention to take the land and defeat the power of sale. *Van Norden Trust Co. v. O'Donohue*, 122 App. Div. 51, 106 N. Y. Supp. 948.

Every interested party must join.

A legatee who is given a specific sum of money payable from the proceeds of sale must join. *Mitchell v. Mitchell*, 137 App. Div. 15, 121 N. Y. Supp. 730.

An election by one of the beneficiaries without the concurrence of the others will not defeat a power of sale. *Mellen v. Mellen*, 139 N. Y. 210; aff'g, 47 N. Y. St. Repr. 930.

Where there is an imperative power of sale, and the beneficiaries desire to take the land, all must join in the election. *McDonald v. O'Hara*, 144 N. Y. 566; aff'g, 9 Misc. Rep. 686, 62 N. Y. St. Repr. 122, 30 N. Y. Supp. 545.

Sale by remainderman before conversion.

An actual sale of the land in which the alienor had an interest, and before the actual sale under the power of sale, creates an equitable mortgage which follows the proceeds after conversion under the power of sale. *Archer v. Archer*, 147 App. Div. 44, 131 N. Y. Supp. 661.

¶ 300 Devisee or Legatee Charged with Payment of Legacies. See ¶ 306.

Where a testator devises all his real and personal estate and charges the devisee with the payment of his debts and legacies, the devisee, if he accept the devise and bequest, is personally liable for such payments. *Gridley v. Gridley*, 24 N. Y. 130.

Where the legacy is directed to be paid by the executor who is a devisee of real estate, such estate is charged with the payment of the legacy; and the devisee upon accepting the devise becomes personally bound to pay the legacy, even though the land devised to him proves to be less in value than the amount of the legacy. *Brown v. Knapp*, 79 N. Y. 136.

Devise of real estate upon condition that the devisee pay a legacy — *held*, that the devisee was personally liable therefor and that the six years' Statute of Limitation applied. *Zweigle v. Hohman*, 75 Hun, 377, 58 N. Y. St. Repr. 660, 27 N. Y. Supp. 111.

Where the devisee did not accept the devise the legatee was denied judgment for his legacy. *Damuth v. Lee*, 29 App. Div. 26, 51 N. Y. Supp. 648; which *aff'd*, 20 Misc. Rep. 439, 46 N. Y. Supp. 286; *aff'd*, 163 N. Y. 478.

Where a will devises the real estate to a person "on condition and proviso that he pay" certain legacies within four years from the death of testator and such real estate is charged with the payment of the same, and such legacies are not paid, such failure does not work a forfeiture, unless there is a provision for forfeiture or re-entry. *Cunningham v. Parker*, 146 N. Y. 29.

Legacy charged upon land and not made a personal obligation of the devisee. *Van Dyke v. Emmons*, 34 N. Y. 186.

A devise of land "on conditions and proviso" that devisee pay certain legacies makes them a charge upon the land so devised. *Loder v. Hatfield*, 71 N. Y. 92. See also *Hutchins v. Hutchins*, 18 Misc. Rep. 633, 42 N. Y. Supp. 601.

Charged with furnishing home. See ¶ 323.

A will gave the use of the real estate to the wife, "subject to * * * giving a home," etc., *held* that the acceptance of the devise created a personal liability. *Glatner v. Glatner*, 149 App. Div. 89, 133 N. Y. Supp. 872.

A person who is devised land, and is to furnish a room in the house and board for another, need not reside on the property and furnish the board personally, provided the tenant who assumes the burden is a proper person. *Getman v. Getman*, 151 App. Div. 808, 136 N. Y. Supp. 1064.

Payment of legacy or annuity charged on land or devisee or legatee.

In many cases, although the devise or legacy of the land or fund be refused, the gift charged therein does not fail, but the subject matter of the original gift remains charged with the payment, 47 N. Y. Law J. 1560. *Birdsall v. Hewlett*, 1 Paige, Ch. 32; *Wheeler v. Lester*, 1 Bradf. 293.

¶ 301 Recovery of Legacy by Action.

Action to recover legacy charged or alleged to be charged on real property, by judgment directing sale thereof.

Heretofore there has been no means provided for collecting a legacy charged on real property by a sale of such property in Surrogate's Court. This has made an action in Supreme Court necessary. By the revision of 1914 provision was made in section 2703 for a sale of the real property left by the deceased for the payment of any legacy charged upon it. See ¶ 247.

Where action is brought.

The collection of a legacy charged on the real estate only by force of the intention of the testator and of existing circumstances should be made by an action declaring it to be so charged and not by an execution. *Hiscock v. Fulton*, 63 Hun, 624, 43 N. Y. St. Repr. 738, 17 N. Y. Supp. 408.

Where several parcels have been sold the parcels should be charged in the inverse order of alienation. *Mallery v. Facer*, 181 N. Y. 567; rev'g, 90 App. Div. 610.

The Statute of Limitations applicable to an action at law against the devisees of the will to recover the legacy was alike available as a defense to a suit in equity founded upon the charge of it as a lien upon the land. *Zweigle v. Hohman*, 75 Hun, 377, 58 N. Y. St. Repr. 660; *Matter of Neilley*, 95 N. Y. 382.

Burden of proof.

The burden of showing extrinsic circumstances showing an intent to charge legacies on real estate is on the legatee claiming it. *Brill v. Wright*, 112 N. Y. 129.

Debts.

In an action to charge land with the payment of a legacy, the debts of the deceased cannot be paid out of the proceeds of sale. *Dunning v. Dunning*, 82 Hun, 462, 64 N. Y. St. Repr. 397, 31 N. Y. Supp. 719.

Effect of judgment.

Decedent's real property not bound by judgment against executors, etc.

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.

§ 1823, Code Civ. Pro.

Action by legatee or distributee against representative to enforce payment of legacy or distributive share may be maintained after one year.

If, after the expiration of one year from the granting of letters testamentary, or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him as the case requires. But for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled, and not before.

§ 1819, Code Civ. Pro.

This section does not affect the rule of limitation applicable to a special proceeding to compel an executor or administrator to account and pay over. *Matter of Elkins*, 74 N. Y. St. Repr. 299, 37 N. Y. Supp. 1129.

Where the Statute of Limitations under this section has run against a legacy, an injunction will be issued restraining the sale by an executor under a power. *Butler v. Johnson*, 41 Hun, 206, 4 N. Y. St. Repr. 151; aff'd, 111 N. Y. 204.

The Surrogate's Court is the tribunal which administers the affairs of decedents, and the payment of legacies and distributive shares are ordinarily enforced through proceedings in that court. It is provided by section 1819 of the Code of Civil Procedure that if an executor or administrator, after the lapse of one year from his appointment, refuses upon demand to pay a legacy, an action may be brought against him therefor. After such refusal he is liable to an action at law, and he cannot raise the objection that the Surrogate's Court is the tribunal in which payment of the legacy should be enforced.

Demand necessary.

This provision of the Code does not mean that any executor, after the lapse of one year, may be sued in an action at law for a legacy; but the fact must be alleged and proved that he has refused to pay the legacy upon proper demand therefor. The demand and refusal are, therefore, conditions precedent to the right to maintain this action, and should be alleged and proved. *Beers v. Strong*, 128 App. Div. 20, 112 N. Y. Supp. 382.

Costs.

In an action to recover the amount of a legacy where the defendant succeeds he is entitled to cost under section 3229, Code Civ. Pro., as a matter of right. *Ladies' U. B. Soc. v. Van Natta*, 96 App. Div. 99, 88 N. Y. Supp. 1083.

Action by infant; guardian's bond.

The guardian ad litem of an infant, in whose favor an action is brought, as prescribed in the last section, must, unless he is also the general guardian, execute and file with the clerk, before the commencement of the action, a bond to the infant, with at least two sufficient sureties, in a penalty fixed by a judge of the court, conditioned that the guardian will duly account to the infant, when he attains full age, or, in case of his death, to his personal

representatives, for all money or property which the guardian may receive, by reason of the legacy or distributive share.

§ 1820, Code Civ. Pro.

¶ 302 Proceeding to Compel Payment of a Legacy.

Former section 2722 giving a proceeding to compel the payment of a legacy after the lapse of six months, has been repealed, for the reason that as a judicial settlement can now be had at the completion of the advertisement for creditors, a more effectual relief can be had in and by the judicial settlement. All general legacies are now due and payable at the completion of the advertisement for creditors (§ 2688, ¶ 290), where such advertisement is had, and if none is had, at the end of one year from the grant of letters.

To provide for a case where no advertisement for creditors is had, section 2687 has been enacted which enables an application to be made for payment of a legacy or delivery of specific property bequeathed.

Proceeding to compel payment of debt, legacy or distributive share, or delivery of property.

Where the executor or administrator has not begun the publication of the notice to creditors to present their claims, and three months have elapsed since the probate of the will or grant of letters of administration, any creditor of the deceased having a claim which has not been rejected, or any person entitled to a specific bequest, or to a legacy or other pecuniary provision under a will, or to a distributive share of an estate, may present to the surrogate's court a petition setting forth the facts and praying that the executor or administrator be cited to show cause why he should not pay said claim or pay or satisfy such bequest, legacy or distributive share.

Upon the return of such citation the executor or administrator may reject such claim, or show good and sufficient cause why he should not pay such claim, or pay or satisfy such bequest, legacy or distributive share in whole or in part.

The surrogate may dismiss such petition, or direct immediate payment or satisfaction thereof in whole or in part, or upon receiving a bond as provided in section 2688 of this chapter.

§ 2687, Code Civ. Pro.

Effect of revision. New section.

Section 2722 has been repealed and this section substituted.

If notice to creditors is being published at the end of three months from the grant of letters, there is no remedy to compel the payment of a debt, but at the completion of the publication of the notice to creditors, the payment can be secured by an application for a compulsory accounting (§ 2726, ¶ 369).

If notice is not being published, at the expiration of such three months it will be assumed that the creditors and assets are known and that payment of a debt can be made.

Section 2688 is found at paragraph 290.

See this section under payment of debts. ¶ 239.

Application should be by petition, not by motion.

The Code, in section 2688, contemplates that the application shall be by petition; that a citation shall issue thereon and that the proceedings shall result in a decree. Section 2688 provides for an answer, for proof and for a decree for the dismissal of the petition in a certain event.

These provisions indicate a special proceeding and are not consistent with a motion in a proceeding already pending. The direction for payment, if contained in a decree, is given a precise meaning (§ 2549), may be docketed as a judgment (§ 2551) and may be enforced by execution (§ 2553). *Matter of Moran*, 58 Misc. 488, 111 N. Y. Supp. 640.

It is not proper practice to make a motion for payment or advancement in a pending accounting or other proceeding.

Although the surrogate entertains the petition, he is not as of course to direct payment of the amount asked, but "is to make such a decree in the premises as justice requires."

By section 2721, Code Civ. Pro., the surrogate is authorized to require an intermediate account when a hearing is had on the petition, and resort should be had to such an accounting in most cases in order that the rights of all parties may be preserved.

The petitioner is neither required to state the facts which go to make out his claim, as if stated he would not be permitted to

establish them. Jurisdiction of the surrogate is confined to undisputed claims. The citation brings in the executor or administrator so that it may be known whether or not the claim is disputed.

The section applied. See also ¶ 239.

These cases were decided under former section 2722 but apply in principle.

An allegation that the legacy is not due does not raise an issue, and does not require the dismissal of the proceedings. A question of construction is raised which is within the surrogate's jurisdiction as incidental to the performance of his duty. *Steinele v. Oechsler*, 5 Redf. 312.

An allegation by the executor that the legatee was indebted to the testator in a sum greater than the legacy is a sufficient denial of the validity and legality of petitioner's claim, and requires the dismissal of the petition. *Smith v. Murray*, 1 Dem. 34.

Where the executor had delayed settlement and then brought a dilatory action to construe the will, the surrogate was upheld in directing payment of a legacy pending such action. *Matter of Scheidler*, 75 Hun, 185, 58 N. Y. St. Repr. 596, 27 N. Y. Supp. 7; aff'd, 142 N. Y. 668.

This proceeding cannot be used to compel the executor or administrator of a deceased executor or administrator to pay money in his hands to a legatee of the first estate. *Matter of Trask*, 49 N. Y. Supp. 825.

Where a legatee was a minor and no special guardian was appointed, the right to demand payment of the legacy accrued one year after letters granted, and section 1819, Code Civ. Pro., does not apply. *Matter of Cooper*, 51 Misc. Rep. 381, 101 N. Y. Supp. 283.

A surrogate has power to direct payment to a legatee of part of his legacy in anticipation of the final accounting. *Gilman v. Gilman*, 63 N. Y. 41.

The will gave the residue of the estate to that person who

should last take care of testator's father before his death. Petition by a person claiming to be that person for payment of the residue — *held*, that the surrogate had no jurisdiction to determine the fact in such a proceeding. *Fiester v. Shepard*, 92 N. Y. 251.

Where the right to payment depends upon a construction of a will the surrogate has no jurisdiction to determine disputed questions of construction since all the interested parties are not before the court and the Code does not grant such power in the proceeding. *Riggs v. Cragg*, 89 N. Y. 479.

While a surrogate has power to construe a will on probate and on judicial settlement, he has no such power in a special proceeding to compel payment of an alleged legacy. *Matter of McClouth*, 9 Misc. Rep. 385, 61 N. Y. St. Repr. 680, 30 N. Y. Supp. 274.

An agreement by the widow with the executor for increased allowance from the estate for the consideration of withdrawal of contest and release of dower cannot be enforced in Surrogate's Court, but it is no bar to a proceeding to enforce a payment under the will. *Howard v. Howard*, 3 Dem. 53.

A verified answer alleging payment to assignee of legacy is sufficient upon which to dismiss proceeding. *Mumford v. Coddington*, 1 Dem. 27.

The assignee of a residuary legatee cannot maintain this proceeding for the turning over of the residuary estate. *Matter of Wood*, 38 Misc. Rep. 64, 76 N. Y. Supp. 967; *Peyser v. Wendt*. 2 Dem. 221.

Legal incorporation of legatee. See ¶ 274.

In *Matter of Trustees of Congregational Church, etc.* (131 N. Y. 1), the church had petitioned the surrogate to compel the payment to it of a legacy under a will. The court said: "Even if a cause of forfeiture appears that cannot be taken advantage of or enforced in a proceeding like this. That question can be raised only by the sovereign power to which the corporation owes

its life, in some proceeding for that purpose by or in behalf of the sovereignty itself."

To the same effect are *People v. Ulster & Delaware R. R. Co.* (128 N. Y. 240), *Coxe v. State* (144 id. 396) and *Smith v. Havens Relief Fund Soc.* (118 App. Div. 678; aff'g, 44 Misc. Rep. 594; aff'd, 190 N. Y. 557).

Defense of the Statute of Limitations.

A proceeding to compel an executor or administrator to account and pay a legacy or distributive share is a proceeding to enforce an obligation or liability not arising on a judgment or sealed instrument and, therefore, the six years' statute (§ 382, Code Civ. Pro.) applies thereto. *Matter of Elkins*, 74 N. Y. St. Repr. 299; *Church v. Olendorf*, 49 Hun, 439, 19 N. Y. St. Repr. 700, 3 N. Y. Supp. 557.

All the proceedings in the Surrogate's Court are regarded as special proceedings within the meaning of the Code of Civil Procedure, and the rule of limitation prescribed by section 382, Code Civ. Pro., is by force of the provision of section 414, Code Civ. Pro., made applicable to such proceedings. *Matter of Elkins*, 74 N. Y. St. Repr. 299.

Application by next of kin to have administrator account and make distribution about nineteen years after his appointment. Although it was claimed that by certain acts the administrator had recognized his liability to the next of kin within six years before the making of the petition, it was not shown that he had so recognized his liability to the petitioner, and the defense of the statute was allowed. *Matter of Elkins*, 74 N. Y. St. Repr. 299.

Where a legatee was a minor and no special guardian was appointed, the right to demand payment of the legacy accrued one year after letters granted, and section 1819, Code Civ. Pro., does not apply. *Matter of Cooper*, 51 Misc. Rep. 381, 101 N. Y. Supp. 283.

Section 1819, Code Civ. Pro., applies to an application for the payment of a legacy and for an accounting so that the Statute of

Limitations does not begin to run until an accounting is had.
Collins v. Waydell, 3 Dem. 30.

¶ 303 Proceeding to Obtain Advance Payment or Delivery of Legacy.

Decree for advance payment of legacy, et cetera, on giving security.

Whenever a person who will be entitled to the payment or satisfaction of any testamentary provision, or distributive share, is in actual need of the same or of some part thereof for his support or education, he may present to the surrogate's court his petition setting forth the facts, and thereupon, in the discretion of the surrogate, a citation may issue to the executor, administrator or testamentary trustee to show cause why the prayer of the petition should not be granted. If it appears on the return of the citation, that the amount of money and the value of the other property in the hands of the respondent applicable to the payment of debts, legacies and expenses, exceeds, by at least one-third the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies or distributive shares of the same class; and that the payment or satisfaction of any testamentary provision or distributive share, or some part thereof, is necessary for the support or education of the petitioner, whether adult or infant, or of his family, the surrogate may, in his discretion, make a decree directing payment or satisfaction accordingly, on the filing of a bond, as provided in section 2688 of this title.

§ 2691, Code Civ. Pro.

Effect of revision. § 2723 amended.

Reference made to adult so that the section could not be construed as applying only to a minor. His family also included.

Former section 2723 re-written, and made similar to new section 2688 as to bond requirement.

There are now the following provisions:

Application for payment of debt, legacy, etc., after three months, if no notice to creditors is being published, and there is sufficient property, and the right is undisputed. § 2687, ¶ 302.

Compulsory payment at the termination of advertisement for creditors, or at the end of a year by means of an accounting, with right to deliver property before that time at the discretion of the executor, or upon giving bond.

Compulsory payment by a testamentary trustee when due. § 2689, ¶ 345.

Discretionary advancement for support, either with or without bond. § 2691.

When the Proceeding May be Maintained.

Cases decided under former § 2722.

An application may be maintained to compel executors to pay interest on legacies due minor, even though real estate converted into personalty by the will must be sold to make such payment. *Matter of Travis*, 10 Misc. Rep. 298, 64 N. Y. St. Repr. 310; aff'd, 85 Hun, 420.

Where a legacy is given a widow in lieu of dower it carries interest from date of testator's death, and such interest may be ordered paid where there has been delay in probate and the widow has no other means of support. *Seymour v. Butler*, 3 Bradf. 193.

Income directed to be paid to beneficiaries when there was likely to be delay in settlement. *Matter of Robinson*, 75 Misc. Rep. 75, 134 N. Y. Supp. 863.

The provision that the advance must be "necessary for the support or education of the petitioner" is a limitation upon the authority of the court which cannot be ignored, but which may be given a liberal construction. *Hoyt v. Jackson*, 1 Dem. 553.

May be maintained against temporary administrator.

This proceeding may be maintained against temporary administrators, and if the party to be cited appears he will be deemed to have waived the issue and service of a citation. See § 2599, Code Civ. Pro., ¶ 243. *Matter of Hitchler*, 21 Misc. Rep. 417, 47 N. Y. Supp. 1069.

Relief may be granted pending probate.

While a contest of a will was in progress, the widow applied for an advancement on her interest and the same was granted

upon her executing a proper bond as provided in section 2691, Code Civ. Pro. *Matter of Hitchler*, 21 Misc. Rep. 417, 47 N. Y. Supp. 1069.

When made by an infant.

This application is not one in which the surrogate can determine what, if any, amount is needed for the support or maintenance of an infant or direct the application thereof for such purpose.

Such an application may be made under section 2664 (¶ 351), Code Civ. Pro., and on an accounting when the guardian has funds in his hands, which can be applied to such purpose. *Matter of Paton*, 7 Misc. Rep. 377, 58 N. Y. St. Repr. 519.

CHAPTER XLV

Devises, Validity, Revocation, and Quantity and Quality of Estate Devised; Dower and Curtesy; Life Tenant and Remainderman. Descent of Real Property, Probate of Heirship, Escheat. Alienism.

- ¶ 304. § 47 (D. E.). Validity of a devise depends upon the law at location of property.
 § 46 (D. E.). Effect of not proving will.
- ¶ 305. § 11 (D. E.). What may be devised.
 § 12 (D. E.). Who may take by devise.
- ¶ 306. § 66 (D. E.). Nature and quantity of estate devised.
 Devise to husband and wife.
- ¶ 307. Liability of heir or devisee to pay mortgage debt.
- ¶ 308. § 37 (D. E.). Revocation of devise.
- ¶ 309. Curtesy of husband.
- ¶ 310. Dower of widow.
 Widow's quarantine and sustenance.
- ¶ 311. Devise or bequest to widow in lieu of dower.
- ¶ 312. Rules for ascertaining value of dower and other life estates.
 Carlisle Table.
- ¶ 313. § 2674. Life tenant and remainderman; apportionment of rent, annuities and dividends.
- ¶ 314. Life tenant and remainderman, expenses and taxes.
- ¶ 315. Proceeding for production of life tenant.
 § 67 (R. P.). Proceeding for sale of real property held by life tenant.
- ¶ 316. § 2765. Probate of heirship.
 § 2766. Decree.
 § 2767. Decree recorded; effect.
- ¶ 317. Escheat.
 Proceeding to recover lands escheated.
- ¶ 318. § 10 (R. P.). Descent of real property.
 Alienism, effect of.

¶ 304 The Validity of a Devise of Real Property Depends upon the Law of the State or Country Where the Same is Located.

The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such

property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state without regard to the residence of the decedent.

Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death. Whenever a decedent, being a citizen of the United States, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws.

§ 47, Decedent Estate Law.

The validity of a devise of real property situated in this State must be determined by the law of this State, irrespective of the domicile of the testator. *White v. Howard*, 46 N. Y. 144.

To pass real property located here the will must have been executed in accordance with our law. *Koppel v. Holm*, 23 Misc. Rep. 557, 52 N. Y. Supp. 830.

Title of devisee does not depend on probate.

A devisee does not need probate of the will by the surrogate in order to establish his right to the land. A devisee can sell, mortgage, and convey, without such probate, and can take possession or maintain ejectment. *Matter of Hatch*, 182 N. Y. 320; rev'g, 97 App. Div. 496; *Smith v. Ryan*, 116 App. Div. 397, 101 N. Y. Supp. 1011. See also *Strong v. Gambier*, 155 App. Div. 294, 140 N. Y. Supp. 410.

Effect of concealment or not probating a will; when purchaser from heir protected, notwithstanding a devise.

The title of a purchaser in good faith, and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within four years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property, in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life;

or without the state; or, if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate.

§ 46, Decedent Estate Law.

This section has no application to children not born until years after testator's death. *Fox v. Fee*, 167 N. Y. 44; aff'g, 33 App. Div. 627.

The concealment of the will intended by the statute is such as leaves the devisees ignorant of their rights under the will and deprives them of knowledge of its existence. *Fox v. Fee*, 167 N. Y. 44; aff'g, 33 App. Div. 627.

A devise or bequest may not be expressed but may be implied.

To devise an estate by implication there must be such a strong probability of an intention to give one, that the contrary cannot be supposed. *Post v. Hover*, 33 N. Y. 593.

In *Thomas v. Troy City National Bank* (19 Misc. Rep. 470, 474), Mr. Justice Chester lays down the rule thus: "If the will should be held to contain simply a gift of the use and income of the estate instead of the fee or the absolute title, there being no disposition in it of the remainder, it should be held under the authorities that there was a devise and bequest of the fee by implication to the parties to whom the income is given. *Masterson v. Townshend*, 123 N. Y. 458; *Philipps v. Chamberlaine*, 4 Ves. 51; *Earl v. Grim*, 1 Johns. Ch. 494, 497." In *Paterson v. Ellis* (11 Wend. 259, 298), Senator Edmonds says: "It is also a rule of law that a devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue. This rule, however, is to be understood with some limitations. Where the intention of the testator to give only the use is clear, manifest, and undisputed, the rule must yield to the stronger force of the intention, but where it is doubtful whether the use only or the absolute ownership was intended to be given, the rule has been allowed to have a controlling effect." *Matter of Hull*, 97 App. Div. 258, 265, 89 N. Y. Supp. 939.

Bequests and devises by implication are not infrequent. Where land is devised to the heir after the death of A, although no specific life estate is conferred upon A, he takes one by implication.

In *King v. Barker* (3 Bradf. 126) the testator devised and bequeathed the residue of his estate to children of his deceased brothers as tenants in common, and provided as follows: "And should either of the said seven children die before me, without leaving any child or other descendant, I hereby give, devise, and bequeath the residuary share or portion of the one so dying to her or his surviving brothers or sisters." One of the residuary legatees having died before the testator leaving children, it was held by the surrogate, although there was no express gift, that there was an implied gift to such children.

Intention to disinherit not sufficient to sustain an attempted devise.

"It is a settled principle of law that the legal rights of the heir or distributee, to the property of deceased persons, cannot be defeated except by a valid devise of such property to other persons. * * * It was not sufficient to deprive an heir-at-law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate." *Haxtun v. Corse*, 2 Barb. Ch. 506, 521; *Chamberlain v. Taylor*, 105 N. Y. 185, 194; *Gallagher v. Crooks*, 132 id. 338, 342; *Pickering v. Lord Stamford*, 3 Ves. 491, 493; *Johnson v. Johnson*, 4 Beav. 318; *Fitch v. Weber*, 6 Hare, 145; *Denn v. Gaskin*, Cowp. 657, 661.

There must be a legal devise to cut off the right of the heirs to inherit. Mere words of disinheritance are not enough. *Gallagher v. Crooks*, 132 N. Y. 338; *Henriques v. Yale U.*, 28 App. Div. 354, 51 N. Y. Supp. 284; *Wood v. Hubbard*, 29 App. Div. 166, 51 N. Y. Supp. 526.

Words in a will declaring that a son shall not receive any part of the estate are not effectual to prevent distribution to such son

of his interest in undevised property. *Rauchfuss v. Rauchfuss*, 2 Dem. 271.

¶ 305 What Property May be Devised; and Who May Take by Devise.

What may be devised.

Every estate and interest in real property descendible to heirs, may be so devised.

§ 11, Decedent Estate Law.

All interests, legal or equitable, in real and personal estate, which, unless otherwise disposed of, descend or devolve on the death of the testator to his heirs or personal representatives may be devised or bequeathed by him in his lifetime. *Am. & Eng. Encyc.* (2d ed.), vol. 18, p. 734.

Effect of devise by will on after-acquired real estate.

Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death.

§ 14, Decedent Estate Law.

H. devised all the real estate he then (now) possessed, and certain property he expected to acquire, but died owning other after-acquired property — *held*, that the will did not cover the property not contemplated. *Quinn v. Hardenbrook*, 54 N. Y. 83.

Whenever the testator refers to an actually existing state of things his language should be understood as referring to the date of the will and not to his death. *Wetmore v. Parker*, 52 N. Y. 450; *Rogers v. Rogers*, 153 id. 343, *aff'g*, 90 Hun, 455.

The intention of the testator to make the will pass after-acquired real estate is shown by the use of the following language: "Desirous of making a suitable disposition of such worldly property and estate as I shall leave behind me." *Youngs v. Youngs*, 45 N. Y. 254.

Where a testator gives in general terms the residue of his estate the testator thereby manifests an intention to devise all property of which he dies possessed. *Byrnes v. Baer*, 86 N. Y. 210.

The rule that a devise of lands will not operate upon lands purchased after the making of the will unless proper language is used to show such intention, discussed. *Lynes v. Townsend*, 33 N. Y. 558.

Testatrix used the following words: "I give and bequeath to my husband J. H., all my real estate and personal property of which I am now possessed," and made no residuary clause—held that after acquired property passed. *Hodgkins v. Hodgkins*, 123 A. D. 110, 108 N. Y. Supp. 173.

Who may take real property by devise.

Such a devise of real property may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise.

§ 12, Decedent Estate Law.

A devise of land to the United States is invalid. *Matter of Fox*, 52, N. Y. 530.

To unincorporated association. See ¶¶ 275, 328.

Devise to treasurer of unincorporated religious body in trust by testator dying in 1876 is invalid. *Murray v. Miller*, 178 N. Y. 316; aff'g, 86 App. Div. 414.

A devise to an unincorporated charitable association is void, and a subsequent incorporation will not make the devise valid. *White v. Howard*, 46 N. Y. 144.

Devises to aliens. See ¶ 318.

The statute regarding ability of aliens to take by devise has been so often changed that the one in force at the date of death of a testator should be consulted. See with any amendments thereto: Real Property Law §§ 10, 12-17; Decedent Estate Law § 13; *Haley v. Sheridan*, 190 N. Y. 331.

Where the death occurred before 1897 when the Real Property Law went into effect see *Criswell v. Noble*, 113 N. Y. Supp. 954.

In the year 1913 sections 12, 13 and 14 of the Real Property Law were repealed, and section 10 was amended so as to allow friendly aliens to take and transmit real property as citizens. Section 13 Decedent Estate Law was also repealed.

Where the devise was made in a will taking effect before 1913, see the following cases:

An alien devisee who may be required by our statute to file a declaration of intent to become a citizen has a reasonable time in which to do so, and if death occurs before the lapse of such time his heirs may take the property by descent as though he had filed such intention. *Smith v. Reilly*, 31 Misc. Rep. 701, 66 N. Y. Supp. 40.

This case was affirmed, *Smith v. Smith* (70 App. Div. 286, 74 N. Y. Supp. 967), where it was said that the death occurred in 1892, and so the case came under the law of 1875, and that the title in any event was good as against all persons except the State.

A devise to an alien is void, but a devise to a trustee to pay the income of real estate to an alien for life is valid. *Marx v. McGlynn*, 88 N. Y. 357.

Devise to deceased person.

A devise to "my sister D, deceased," held to be a devise to the children of such sister. *Carroll v. Adams*, 105 N. Y. Supp. 967.

Devise to person charged with the murder of testator.

An apparent devise is not void where the devisee is charged with the murder of the testator, so that the question of his guilt or innocence can be tried in a partition action. *Ellerson v. Westcott*, 148 N. Y. 149.

The court may undertake to prevent the murderer from enjoying the fruits of his crime by forbidding the enforcement of the legal right to the property given by the will, but the devise itself must stand.

The decision that statutes regulating descent and distribution cannot be set aside by a court acting on its own conception of right and wrong is the general view which has prevailed in re-

gard to this matter wherever it has arisen. It has been so held in Iowa, *Matter of Kuhn*, 125 Iowa, 449, 2 Ann. Cas. 657; Kansas, *McAllister v. Fair*, 72 Kan. 533, 7 Ann. Cas. 973; Nebraska, *Shellenberger v. Ransom*, 41 Neb. 631; North Carolina, *Owens v. Owens*, 100 N. Car. 240; Ohio, *Deem v. Millikin*, 53 Ohio St. 668, 3 Ohio Cir. Dec. 491; and Pennsylvania, *Carpenter's Estate*, 170 Pa. St. 203.

¶ 306 Nature and Quantity of Estate Devised.

Devise to two or more persons.

When estate in common; when in joint tenancy.

Every estate granted or devised to two or more persons in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy; * * *.

From § 66, Real Property Law.

A devise to two or more persons is, unless otherwise directed, a tenancy in common, and if one devisee dies before the testator, such share lapses and the testator dies intestate of that share. *Matter of Kimberly*, 150 N. Y. 90; aff'g, 3 App. Div. 170, 78 N. Y. St. Repr. 738, 38 N. Y. Supp. 399. *Matter of Krummenaker*, 60 Misc. Rep. 55, 112 N. Y. Supp. 596.

The use of the word "jointly" in a will not carefully drawn is not sufficient to overcome the force of the statute. *Overheirser v. Lackey* 207 N. Y. 229.

A will which gave three parcels of land to three sons did not designate the parcel of each — *held*, that the devises were valid and that the devisees might select their parcels in the order in which the devisees were named in the will. *Matter of Turner*, 206 N. Y. 93; rev'g, 149 App. Div. 946.

Devise subject to payment of debts or legacies.

Real property is often devised subject to the payment of debts or legacies or both; or the payment of debts, or legacies or both may be charged upon the devisee. See ¶¶ 238, 247.

Land devised to son charged with payment of debt due from son to testator. Son refused to accept the devise — *held*, that the debts were charged on all the land descending and not on the share that descended to the heirs of the son. *Youngs v. Youngs*, 102 App. Div. 444; *aff'd*, 183 N. Y. 550.

Devise of fee subject to power of sale. See ¶¶ 208, 298.

In *Taber v. Willets* (1 App. Div. 287, 37 N. Y. Supp. 234), Mr. Justice Hatch said:

“It is not an unusual feature in testamentary disposition to devise a fee, and subsequently vest a power of sale in the executors of the instrument. Such power of sale is not necessarily repugnant to the devise in fee, and the courts have found little difficulty in sustaining it, holding that the estate vests in the devisees subject to the execution of the power. *Crittenden v. Fairchild*, 41 N. Y. 289; *Kinner v. Rogers*, 42 *id.* 531; *Drake v. Paige*, 127 *id.* 569, 28 N. E. 407.”

Affirmed in *Taber v. Willets*, 153 N. Y. 663, 48 N. E. 1107. See *Smith v. A. D. Farmer Type Founding Co.*, 18 Misc. Rep. 436, 41 N. Y. Supp. 788.

In the case of *Mellen v. Mellen* (139 N. Y. 210, 34 N. E. 925), Mr. Justice Andrews said:

“There is no repugnancy between a devise in fee and a subsequent power of sale given to the executor for the benefit of the devisees. This is a common incident of testamentary dispositions.”

“Where it is evident from the face of a will that the testator intended not to require his executors to sell the real estate forming a part of a trust therein created, but to permit them to sell it, and to divide the proceeds, or to divide the real estate among the devisees, there is no conversion of the realty into personalty.” *Palmer v. Marshall*, 81 Hun, 15, 30 N. Y. Supp. 567.

This case was cited by Mr. Justice Gaynor in the case of *Miller v. Miller*, 22 Misc. Rep. 582, 49 N. Y. Supp. 407. *Stebbens v. Turner*, 55 Misc. Rep. 587, 105 N. Y. Supp. 945.

Where there was an absolute devise to certain residuary legatees, and then a devise to an executor named in trust for payment of debts and legacies with a power of sale attached — *held*, that the title vested in the residuary legatees subject to the exercise of the power of sale for the purposes mentioned, and that there was no conversion. *Coann v. Culver*, 188 N. Y. 9; rev'g, 108 App. Div. 360.

Devise to a class; nature of estate.

It is the general rule of construction that a future and contingent devise or bequest to a class takes effect on the happening of the contingency on which the limitation depends only in favor of those objects who at that time come within the description. *Matter of Allen*, 151 N. Y. 243; aff'g, 81 Hun, 91, 62 N. Y. St. Repr. 636, 30 N. Y. Supp. 683.

Devise to daughter for life and on her death to her children "should she leave any" means that the title does not vest until the death of the life tenant and then in such children as may survive. *Hebberd v. Lese*, 107 App. Div. 425, 95 N. Y. Supp. 333.

The primary rule of construction is that the class is determined as to its membership as it existed at the time of the death of the testatrix. This is so where the devise gives an immediate right of possession, but this rule is qualified by the familiar and correlative rule that where the right of enjoyment is postponed to the happening of a future event the estate devised, though immediately vested, is subject to open and let in all persons born after the death of the testator who would answer the description of the class at the time when the right to enjoyment accrues. The most familiar example of this rule arises where an antecedent estate has been carved out, *e. g.*, a life estate. *Bisson v. West Shore R. R. Co.*, 143 N. Y. 125. *Seitz v. Faversham*, 141 App. Div. 903, 126 N. Y. Supp. 801, 205 N. Y. 197.

Devise to husband and wife creates a tenancy by entirety and the survivor takes the whole estate.

Where a devise or conveyance is made to a husband and wife the presumption is that they take title by entirety which is unseverable. *Miner v. Brown*, 133 N. Y. 308; *Hiles v. Fisher*, 144 id. 306; aff'g, 67 Hun, 229; *Bertles v. Nunan*, 92 N. Y. 152.

This rule may be modified by qualifying words in the instrument which indicate an intention to take as joint tenants or by tenancy in common.

Joint use.

Where a tenancy by the entirety is created, the husband and wife have the joint use of the property, each being entitled to one-half during their joint lives. Either may mortgage such use. *Hiles v. Fisher*, 144 N. Y. 306; aff'g, 67 Hun, 229.

To lawful heirs; per stirpes or per capita.

It has been held that a devise to "heirs," whether it be one's own heirs, or to the heirs of a third person, designates not only the persons who are to take, but also the manner and proportions in which they are to take; and that, when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent. *Dagget v. Slack*, 8 Metc. 450.

Accordingly it has been held that a gift to a person described as standing in a certain relation to the testator and to the heirs of another person standing in the same relation to him imports an intention upon the part of the testator that the persons named and described shall take *per stirpes*; while the general rule is that a gift to a person described as standing in a certain relation to the testator and to the *children* of another standing in the same relation imports an intention that the legatees shall take *per capita*. *Clark v. Lynch*, 46 Barb. 69; *Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 id. 505; *Woodward v. James*, 115 id. 346; *Bisson v. W. S. R. R. Co.*, 143 id. 125; aff'g, 66 Hun, 604.

In a case where a gift has been made to one or more persons standing in a certain relation to the testator, who are named in his will, and one or more groups of heirs of deceased persons who stood in the same relationship to him, as those who are named, a direction to equally divide might be satisfied by an equal division among the individuals and groups, giving to each group the same share as to each individual named. *Matter of Griswold*, 42 Misc. Rep. 230, 86 N. Y. Supp. 250.

¶ 307 Liability of Heir or Devisee to Pay Mortgage Debt.

"Where real property, subject to a mortgage executed by an ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator that such mortgage be otherwise paid."

§ 250, Real Property Law.

Prior to this statute the personalty was the primary fund for the payment of mortgage debts as well as others of the ancestor.

At common law the heir was not chargeable with simple contract debts of such decedent; nor was he, unless mentioned in the bond of the ancestor, liable for debts by specialty of the latter, and when so named, his liability was to the extent only of the land which descended to him. This liability of the heir was in this State at first extended so as to embrace simple contract debts as well as specialties, whether the heir was mentioned in them or not; and for the purpose of charging him by means of action at law, a system of practice was provided by statute. Laws of 1786, chap. 27. That was superseded by the Revised Statutes which furnished provisions for suits by and against legatees and against next of kin and heirs and devisees and between heirs and devisees. 2 R. S. 450. Under those provisions the liabilities of heirs and devisees are secondary and dependent upon the insufficiency of the personal estate of the decedent. The only exception to the primary charge of the debts upon the personalty was in the provisions of section 4 of the Revised Statutes before

mentioned. And that did not in terms charge the heir with personal liability, nor was it contemplated by the statute that he should be so liable, irrespective of the property which descended to him, but rather that his liability to pay the mortgage out of his own property should be measured by and not exceed that which descended to him from his ancestors. The evident purpose of the revisers was, in the case provided for, to make the land the primary fund for the payment of the mortgage debt. 3 R. S. (2 ed.) 600. And to give it practical effect that section and the other provisions of the statute on the subject, so far as applicable, are *in pari materia*. In that view the remedy is by action in equity having the nature of a proceeding *in rem* in such sense that when the land has not been aliened by the heir the execution of the judgment shall be had by levy upon the real estate descended to him. 2 R. S. 454, § 47; Code, § 1852; *Butts v. Genung*, 5 Paige, 254, 259; *Schermerhorn v. Barhydt*, 9 id. 28; *Wood v. Wood*, 26 Barb. 356. And to hold that the remedy is confined to the mortgaged premises would not give effect to the apparent purpose of the statute as represented by its terms. Such limitation is not consistent with its provisions that the heir shall satisfy and discharge the mortgage out of his own property. Nor is it reasonable to suppose that the statute was intended to create a personal liability of the heir for the amount of the mortgage debt, but as we construe the statute, its design was to make, so far as practicable, the realty primarily chargeable with the payment of a debt of the decedent secured by mortgage on his land, and that when with the mortgaged premises the heir inherited other lands of the same ancestor he should take them altogether *cum onere* the mortgage debt, assuming that there was a personal liability of the decedent to pay it at the time of his decease. *Roosevelt v. Carpenter*, 28 Barb. 426. This, however, was not intended to give such creditor a preference over other creditors of the decedent in the proceeds of the lands not covered by the mortgage when there is a deficiency of the personal estate to pay them. 2 R. S. 453, §§ 39, 40; Code, § 1856. The preference of the mort-

gage creditor in the mortgaged premises is only available to him by foreclosure of his mortgage and not by action under the statute. And in such action the heir may allege in his answer and prove that there are other debts of the decedent unsatisfied belonging to the same or prior class of that on which the action is founded and properly chargeable against the land by reason of deficiency of personalty. *Schermerhorn v. Barhydt*, 9 Paige, 28, 45.

The statute provides that the action be brought against all the heirs jointly (Laws of 1837, chap. 460, § 73; Code, § 1846); that the amount which the plaintiff is entitled to recover shall be apportioned among them in proportion to the value of the real estate descended to the heirs respectively; and that the costs recovered shall in like manner be apportioned among them (2 R. S. 455, §§ 52, 53; Code, § 1847). In the view just taken the only substantial advantage of the mortgage creditor over other creditors in respect to land inherited by the heirs, other than that covered by his mortgage, is in the fact that his right of action is not dependent upon a deficiency of personal assets of the decedent. *Hauselt v. Patterson*, 124 N. Y. 349. See 51 Hun, 321.

Where there is a mortgage on real estate, the balance due upon the bond must be paid from the proceeds of the sale of such real estate and not from the personal estate. See 43 N. Y. 521-525. *Rauchfuss v. Rauchfuss*, 2 Dem. 271.

An action to foreclose a mortgage brought in the lifetime of testator against the mortgagor who was named as one of the testator's executors may be revived and prosecuted by the coexecutor upon testator's death. *McGregor v. McGregor*, 35 N. Y. 218.

Where one dies seized of real estate covered by a mortgage which is thereafter foreclosed and the land sold, any surplus arising on the sale is to be regarded as realty and goes to the heirs or devisees, and not to the executor or administrator, even though the executor be given power of sale by the will. *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; aff'g, 6 Lans. 296.

Express direction to pay mortgage. *Alexander v. Powell*, 3 Dem. 152.

Devisee not liable beyond the value of the property devised to him. *Hauselt v. Patterson*, 124 N. Y. 349. See 51 Hun, 321.

A devisee is bound to pay the mortgage debt, and cannot resort to the personal estate for such payment. *Van Vechten v. Keator*, 63 N. Y. 52; *Matter of Kene*, 8 Misc. Rep. 102, 1 Gibb. Sur. Rep. 65, 60 N. Y. St. Repr. 163, 29 N. Y. Supp. 1078.

Statute of Limitations.

A payment by an heir upon the mortgage on the land descending to him will arrest the running of the Statute of Limitations as to that land, but as to no other part of the mortgaged premises. *Murdock v. Waterman*, 145 N. Y. 55; rev'g, 71 Hun, 320, 55 N. Y. St. Repr. 1.

Interest on mortgage.

Interest accruing after death of owner must be paid by heir or devisee, and not from deceased owner's personal estate. *Matter of Roberts*, 72 Misc. Rep. 625, 132 N. Y. Supp. 396.

¶ 308 What Acts Will Effect a Revocation of a Devise or Bequest.

Bond to convey property devised, not a revocation thereof.

A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

§ 37, Decedent Estate Law.

Effect of delivery of deed in escrow under contract of sale.

“The question to be determined is whether the devise to James Baynes was revoked by the subsequent contract to convey the property devised, and by the delivery of the deed in escrow. The effect of the agreement to convey was to convert the testatrix's property from real estate to personalty. *Williams v. Haddock*,

145 N. Y. 144. At common law, either the agreement to convey, or the delivery of the deed in escrow, would have revoked the specific devise. *Walton v. Walton*, 7 Johns. Ch. 258; *Adams v. Winne*, 7 Paige, 97; *Beck v. McGillis*, 9 Barb. 35; *Brown v. Brown*, 16 id. 569; *McNaughton v. McNaughton*, 34 N. Y. 201; *Gray v. Gray*, 5 App. Div. 132, 39 N. Y. Supp. 57. The question is: Has the statute (2 R. S. 64, pt. 2, chap. 6, tit. 1, §§ 45 to 48) changed the common-law rule? The contract to sell did not revoke the will (*Id.*, § 45; *Knight v. Weatherwax*, 7 Paige, 182; *Wagstaff v. Marcy*, 25 Misc. Rep. 121, 54 N. Y. Supp. 1021); nor did the delivery of the deed in escrow (*Id.*, §§ 47, 48). Where a deed is delivered as an escrow nothing passes by the deed unless and until the condition of its delivery is performed. *Jackson v. Catlin*, 2 Johns. 248; *Catlin v. Johnson*, 8 id. 520; *Frost v. Beekman*, 1 Johns. Ch. 288, 18 Johns. 544; *Jackson v. Rowland*, 6 Wend. 666; *Green v. Putnam*, 1 Barb. 500; *Cagger v. Lansing*, 43 N. Y. 550; *Calhoun Co. v. Am. Emigrant Co.*, 93 U. S. 124. It is only where the estate or interest in the property specifically devised is wholly divested that the devise is revoked. *Id.*, § 47; *Vandemark v. Vandemark*, 26 Barb. 416; *Matter of Dowd*, 58 How. Pr. 107; *Langdon v. Astor's Executors*, 16 N. Y. 9-39. The fact that by fiction of law the second delivery of the deed takes effect from the time of the first, in case of the death of the grantor intermediate the two, in no wise alters the fact that it had not taken effect when the testatrix died, and the will speaks from that event. Therefore, said sections 45 and 47 save the contract to sell and the escrow respectively from operating to revoke the specific devise, and the devisee takes the proceeds substituted for the property devised. *Van Tassel v. Burger*, 119 App. Div. 509, 104 N. Y. Supp. 273.

Charge or incumbrance not a revocation of a devise.

A charge, or incumbrance, upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously

executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance.

§ 38, Decedent Estate Law.

Conveyance, when not to be deemed a revocation of a devise.

A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest.

§ 39, Decedent Estate Law.

Conveyance, when to be deemed a revocation of a devise.

But if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

§ 40, Decedent Estate Law.

A sale of land devised will revoke such devise, but a gift may be made of the proceeds of such sale. *Hoffman v. Steubing*, 49 Misc. Rep. 157, 98 N. Y. Supp. 706.

A contract regarding a partnership business *held* to be valid and to be inconsistent with the provisions of the will. *Walker v. Steers*, 38 N. Y. St. Repr. 654, 14 N. Y. Supp. 398.

Property devised by a will was afterward taken by condemnation proceedings — *held*, that the devise was thereby revoked. *Ametrano v. Downs*, 62 App. Div. 401, 70 N. Y. Supp. 833; *aff'd*, 33 Misc. Rep. 180, 67 N. Y. Supp. 128; *aff'd*, 170 N. Y. 388.

¶ 309 **Curtesy of Husband in Lands Held by Wife.**

See ¶ 251.

“Tenancy by the curtesy is an estate for life, accruing to the husband on the death of the wife, in the estate of inheritance of which she was seized in possession, in fee simple or fee tail, during coverture, provided he has had by her lawful issue capable of

inheriting the estate, born alive, before her death." Am. & Eng. Ency. of Law, Second Edition.

Curtesy is a common-law estate and is recognized by the laws of this State. It gives to the husband a life estate in the lands of which the wife died seized.

Actual seizin of the wife during coverture is necessary to a tenancy by curtesy; where there is an outstanding estate for life the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular intervening estate terminates during coverture. *Ferguson v. Tweedy*, 43 N. Y. 543; *Carr v. Anderson*, 6 App. Div. 39 N. Y. Supp. 746.

A husband is not entitled to curtesy in land of the wife which is subject to a life estate in another which does not end during the life of the wife. *Collins v. Russell*, 96 App. Div. 136; aff'd, 184 N. Y. 74; *Ferguson v. Tweedy*, 43 id. 543.

The nature of tenancy by the curtesy both before and after the passage of the Married Women's Act is discussed at length in *Matter of Starbuck*, 137 App. Div. 866, 122 N. Y. Supp. 584; aff'd, 201 N. Y. 531.

Where a husband is imprisoned for life, and afterward pardoned, he has no curtesy in the lands of his wife who married again and thereafter acquired real estate. *Glielmi v. Glielmi*, 72 Misc. Rep. 511, 131 N. Y. Supp. 373. See ¶ 456.

Curtesy in dower portion of estate of wife's mother.

Where an estate descends to a daughter who is married, and who dies in the lifetime of the mother to whom dower in the premises is subsequently assigned, the husband of such daughter will not be entitled to an estate by the curtesy in the third of the premises which is thus assigned to the widow of his wife's father for dower, even after the termination of the life estate of such widow in that third of the premises. *Reynolds v. Reynolds*, 5 Paige, 161; *Howells v. McGraw*, 97 App. Div. 460, 90 N. Y. Supp. 1.

Where a married woman inherited from her father, subject to the dower right of her mother, and became actually seized thereof

in possession, her subsequent conveyance of the property to her mother for life did not cut off her husband's right to curtesy in the reversion on termination of the mother's life estate, though such curtesy did not attach to the one-third share in which the mother had a dower interest. *Valentine v. Hutchinson*, 43 Misc. Rep. 314, 88 N. Y. Supp. 862.

¶ 310 Dower of Widow in Lands Held by Her Husband.

See ¶ 251.

Nature of dower right.

Dower accrues to the widow and not to the wife, and until she becomes a widow her right is inchoate and contingent. Being inchoate and contingent, her interest does not amount to an estate or title, being in the nature of a *chose in action*, and yet she has an interest which attaches to the land as soon as there is a concurrence of marriage and seizin. This interest becomes fixed and certain upon the death of the husband, his wife surviving, and after assignment of the dower becomes a freehold estate in land. *Sherman v. Hayward*, 98 App. Div. 254, 90 N. Y. Supp. 481.

Dower in trust lands.

During the continuance of a trust where the rents and profits of land go to the trustees the title is in them and no dower attaches. *Matter of Faile*, 51 Misc. Rep. 166, 100 N. Y. Supp. 856; *Morse v. Morse*, 85 N. Y. 53; *Robinson v. Adams*, 81 App. Div. 20; mod'g, 30 Misc. Rep. 537, 63 N. Y. Supp. 816; aff'd, 179 N. Y. 558.

Statutory provisions regarding dower.

A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage.

§ 190, Real Property Law.

Where a son assigns all his interest in his father's real estate during the life of his father, upon the death of the father the son

is not seized of a beneficial estate to which dower will attach. *Baker v. Bagg*, 61 Misc. Rep. 186, 114 N. Y. Supp. 660.

A woman who has married in good faith, her first husband not having been heard from in more than five years (see ¶ 23), may have dower in the real estate of the second husband. *Matter of McKinley*, 66 Misc. Rep. 126, 122 N. Y. Supp. 807.

Dower in lands exchanged.

If a husband seized of an estate of inheritance in lands exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

§ 191, Real Property Law.

Dower in lands mortgaged before marriage.

Where a person seized of an estate of inheritance in lands executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

§ 192, Real Property Law.

Dower in lands mortgaged for purchase money.

Where a husband purchases land during the marriage, and at the same time mortgages his estate in those lands to secure payment of the purchase money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

§ 193, Real Property Law.

Dower of widow in surplus on mortgage foreclosure.

Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

§ 194, Real Property Law.

How dower is barred.

When dower barred by jointure.

Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent, the jointure bars her right or claim of dower in all the lands of her husband. The assent of the wife to such a jointure is evidenced if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

§ 197, Real Property Law.

When dower barred by pecuniary provisions.

Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

§ 198, Real Property Law.

When widow to elect between jointure and dower.

If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

§ 199, Real Property Law.

Dower of Former Wife in Case of Divorce.

When dower barred by misconduct.

In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

§ 196, Real Property Law.

Dower where either husband or wife is divorced; husband plaintiff.

Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property or to a distributive share in his personal property.

§ 1760, subd. 3, Code Civ. Pro.

Wife plaintiff.

Where final judgment is rendered dissolving the marriage the plaintiff's inchoate right of dower in any real property of which the defendant then is or was theretofore seized is not affected by the judgment.

§ 1759, subd. 4, Code Civ. Pro.

The relation of husband and wife, both actual and legal, is utterly destroyed, and no future rights can thereafter spring out of or arise from it. Existing rights already vested are not thereby forfeited, and are taken away only by special enactment as a punishment for wrong. But future rights dependent upon the marital relation and born of it there can be none. Thus, the wife's dower at the date of the decree is vested as an inchoate right, at least as against the husband, whether she be innocent or guilty, by the concurrence of marriage and seizin. It has fastened upon the land and follows it as an incumbrance and would become consummate upon the death of the husband in either event, but for the express mandate of the statute which forfeits it where the wife is the guilty party. But the wife, although blameless, acquires no dower right in lands conveyed to the husband after the divorce because he was not seized during the coverture. *Kade v. Lauber*, 16 Abb. Pr. (N. S.) 288.

The coverture is ended and cannot serve to found a new right after its destruction. The existing inchoate right remains, because it has already accrued, has not been forfeited by guilt, and does not depend upon the continuance of the marriage relation, but independent of that continuance becomes consummate by the death of him who was the husband when it sprang into being. *Matter of Ensign*, 103 N. Y. 284.

To land or an interest in land acquired by the husband subsequent to the divorce terminating the marriage relation, no dower right could attach. *Nichols v. Park*, 78 App. Div. 95, rev'g, 38 Misc. Rep. 176, 77 N. Y. Supp. 220.

Foreign divorce.

Woman obtained an absolute divorce in another State (not on the ground of adultery) and her husband thereafter died in this State having owned real property here during the time of the marriage—*held* that the divorce did not bar her dower. *Van Blaricum v. Larson*, 146 App. Div. 278; aff'd, 205 N. Y. 355.

Wife may release her inchoate dower right in lands of her divorced husband.

A woman who is divorced from her husband, whether such divorce be absolute or limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him by an instrument in writing, sufficient to pass title to real estate, her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire.

§ 206, Real Property Law.

Where the divorce is limited and was procured by the wife, she may release her dower. *Schlesinger v. Klinger*, 112 App. Div. 853, 98 N. Y. Supp. 545.

Married women may release dower by attorney.

A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

§ 207, Real Property Law.

Widow's Quarantine and Sustenance. See ¶ 192.

Widow's quarantine and sustenance in husband's chief house.

A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

§ 204, Real Property Law.

Widow's sustenance.

This provision for the support of a widow is often confused with the provision of section 2670 (¶ 192), Code Civ. Pro., requiring the appraisers to set off to the widow and minor children the provisions and fuel on hand. It is, however, an independent statutory provision for her support in the chief house of her husband in which she has a dower right, and in which the statute says she may remain for forty days, rent free and be supported from his estate.

These statutes ought to be construed so that they will harmonize as far as possible. Certainly it was not intended that a widow should be allowed for her support from two different sources at the same time, and yet it is not easy to see how this

can be avoided in some instances. *Matter of Meuschke*, 61 Misc. Rep. 9, 114 N. Y. Supp. 722.

Sustenance may be allowed out of an insolvent estate. *Johnson v. Corbett*, 11 Paige, 265-276.

The sustenance is for the widow alone, not even for minor children; their support is provided for by the setting off of exempt articles in the inventory. *Johnson v. Corbett*, 11 Paige, 265-276.

In *Fisk v. Cushman* (6 Cush. [Mass.] 20), it was held that where both husband and wife were from home when the husband died, and the widow did not return immediately, she was not entitled to charge the estate for her support.

Quarantine.

Quarantine can be had on only such land as the widow may have a dower right in. *Voelckner v. Hudson*, 1 Sandf. 215, 218.

Amount to be allowed.

Widow having use of homestead and all personal property, and having received \$188 in money, not entitled to an allowance for forty days' sustenance nor to \$150 for household furniture. *Peck v. Sherwood*, 56 N. Y. 615.

Where the widow had been boarding at \$5 a week, that amount was allowed. *Matter of Stiles*, 64 Misc. Rep. 658, 120 N. Y. Supp. 714.

A charge for services of a nurse was not allowed when the widow did not appear to have been ill, or to have required an attendant after the period of quarantine was over. *Matter of Percival*, 79 Misc. Rep. 567, 140 N. Y. Supp. 180.

¶ 311 Devise or Bequest to Widow in Lieu of Dower. See ¶¶ 229, 288.

The statute provides (Real Property Law, § 198) that "any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her * * *, bars her right or claim of dower in all the lands of her husband." Pecuniary pro-

vision for the wife need not be made by will, but may be made by antenuptial agreement if it is expressed in the agreement that it is accepted in lieu of dower. Consult Antenuptial Agreement, ¶ 445.

Election between devise and dower.

If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both.

§ 200, Real Property Law.

The right of the wife to dower in the lands owned by the deceased during coverture is absolute; and no provisions in the will for the benefit of the widow will be deemed to be taken in lieu of dower, unless there is an express declaration to that effect contained in the will, or the general scheme under which the will is drafted is so inconsistent with the claim of dower that it is apparent the intention of the deceased was to give the same to the widow in lieu of such dower and, therefore, to compel her to elect which she would take.

The rule is well settled that to bar a widow's dower the testator must have intended such a result and such intention must clearly appear. To bar a claim of dower because of the acceptance of a legacy, such claim must be inconsistent with and repugnant to the provisions of the will respecting the disposition of the real estate. *Adsit v. Adsit*, 2 Johns. Ch. 448, 450. And if there is a reasonable doubt as to the testator's intention in that regard, the widow takes both dower and the legacy. *Matter of Gorden*, 172 N. Y. 25, 28. But it is equally well settled that where the real estate of a testator is disposed of by will in such manner as to clearly indicate that he did not intend that the use of one-third of it should belong to the widow, she is put to her election as between a bequest for her benefit and her claim for dower, and, if she elects to take the former, she cannot have the latter. *Orth v. Haggerty*, 126 App. Div. 118, 110 N. Y. Supp. 551.

The courts will endeavor to sustain a claim of dower rather than to assume that any provision was intended in lieu thereof. *Matter of Johnson*, 50 Misc. Rep. 99, 100, 100 N. Y. Supp. 373.

Where a will makes provision for the widow but does not state that such provision is in lieu of dower, and authority is given to the executor to sell the real estate not devised to the wife at a price fixed, the provision is inconsistent with a claim for dower. *Vernon v. Vernon*, 53 N. Y. 351.

The claim of dower is inconsistent with the provisions of the will which requires the executor to rent, lease, repair, etc., the real estate out of which money is to be raised to pay the bequests to the widow; and, therefore, the widow cannot claim under the provisions of the will without relinquishing her right to dower. *Tobias v. Ketchum*, 32 N. Y. 319.

A devise of the whole of testator's estate to his widow for life with remainders over is not a provision in lieu of dower unless such intention be implied from other terms of the will. *Lewis v. Smith*, 9 N. Y. 502.

A devise to a widow of a life estate in her husband's real estate does not put her to her election. *Hopkins v. Cameron*, 34 Misc. Rep. 688, 70 N. Y. Supp. 1027.

Provision in will for wife will not be construed by implication to be in lieu of dower or other interest in his estate given by law. *Sheldon v. Bliss*, 8 N. Y. 31.

The husband directed his executors to sell all his real and personal estate and divide the proceeds equally between his wife and children — *held* that the widow was entitled to dower and was not put to her election. *Konvalinka v. Schlegel*, 104 N. Y. 125.

Bequest of money, furniture, and of the income of a trust fund of \$50,000 with power of sale of real estate in executors — *held* not sufficient to make a bequest in lieu of dower. *Kimbel v. Kimbel*, 14 App. Div. 570, 43 N. Y. Supp. 900.

Gift to wife of use of the whole estate subject to the payment of an annuity is not in lieu of dower. *Purdy v. Purdy*, 18 App. Div. 310, 46 N. Y. Supp. 215.

Gift and devise to wife and two children equally of entire estate, is not in lieu of dower. *Closs v. Eldert*, 30 App. Div. 338, 51 N. Y. Supp. 881.

Where there was a devise to wife during life or widowhood — *held* that upon remarriage she would be entitled to dower. *Brown v. Brown*, 41 N. Y. 507.

Where a will gave the widow a sum in lieu of dower and of her distributive share in the estate — *held* that there was an implied bequest of the amount of the distributive share, if she elected to receive it. *Matter of Vowers*, 113 N. Y. 569; *rev'g*, 45 Hun, 418.

Where a wife is given real estate and personal property in lieu of dower, she takes the real estate subject to any mortgage or incumbrance. *McYer v. Cahen*, 111 N. Y. 270.

Where real estate is left in trust. See ¶ 333.

It has long been settled by our decisions that where all of the realty is left in trust, such trust is “inconsistent with the right of the widow to manage or control any part of the realty,” *i. e.*, inconsistent with her right of dower. *Matter of Gordon*, 172 N. Y. 25; *Savage v. Burnham*, 17 *id.* 561; *Tobias v. Ketchum*, 32 *id.* 319; *Vernon v. Vernon*, 53 *id.* 351.

The case of *Konvalinka v. Schlegel* (104 N. Y. 125) may seem a stumbling block until you perceive that there the realty was converted into personalty by an imperative power of sale, and that therefore no physical difficulty of the division of land was presented. In the case of *Lewis v. Smith* (9 N. Y. 502), where the devise was of the whole estate to the widow for life, with remainder over, it is manifest that the widow was not put to her election, for her claim of dower, as is there pointed out, could not conflict with the interest of any one who took under the will. There was no one to put her to an election; and if the husband's debts were sufficient to consume the estate, so that her dower estate in a third was worth more than a life estate in the whole, she had the right to hold her dower estate away from the creditors. *Wilson v. Wilson*, 120 App. Div. 581, 105 N. Y. Supp. 151.

Where a will creates a trust and vests the entire legal estate in the trustees, the provision made for the widow is inconsistent with the right of dower and she is bound to elect. *Savage v. Burnham*, 17 N. Y. 61.

When deemed to have elected.

Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But during such period of one year after the death of her said husband, her time to make such election may be enlarged by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator cannot be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons, and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

§ 201, Real Property Law.

The widow is charged with the duty of informing herself of the condition of her husband's estate so as to make her election. *Akin v. Kellogg*, 119 N. Y. 441; aff'g, 48 Hun, 459.

Death of widow.

A widow who dies during the year following her husband's death, not having elected between a legacy in lieu of dower and her dower, will be deemed to have elected to take the legacy. *Flynn v. McDermott*, 43 Misc. Rep. 513, 89 N. Y. Supp. 506; aff'd, 102 App. Div. 56; aff'd, 183 N. Y. 62.

Widow brought suit to have will declared invalid, and died within a year — *held*, that the statute gave her her legacy, she not having renounced it. *Flynn v. McDermott*, 102 App. Div. 56; . . . aff'g, 43 Misc. Rep. 513, 89 N. Y. Supp. 506; aff'd, 183 N. Y. 62.

Insanity of widow.

A widow who is insane at the death of the husband and so remains cannot make the election required, neither can any other person do it for her. *Camardella v. Schwartz*, 126 App. Div. 334, 110 N. Y. Supp. 611.

When provision in lieu of dower is forfeited.

Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, and estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

§ 202, Real Property Law.

¶ 312 Rules for Ascertaining Value of Dower and Other Life Estates.**Gross sum in payment of life estate.**

Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of 5 per cent. on the principal sum, during the probable life of such person, according to the Carlisle Table of Mortality.

Rule 70, General Rules of Practice.

ANNUITY TABLE.

Table showing the value of an annuity of One Dollar on a single life, according to the Carlisle Table of Mortality, at five per cent. interest, see Supreme Court, General Rule No. 70.

Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.
0	12.083	35	14.127	70	6.336
1	13.995	36	13.987	71	6.015
2	14.983	37	13.843	72	5.711
3	15.824	38	13.694	73	5.434
4	16.271	39	13.541	74	5.190
5	16.590	40	13.389	75	4.989
6	16.735	41	13.244	76	4.792
7	16.790	42	13.101	77	4.609
8	16.786	43	12.956	78	4.422
9	16.742	44	12.805	79	4.210
10	16.669	45	12.648	80	4.014
11	16.581	46	12.480	81	3.799
12	16.495	47	12.301	82	3.606
13	16.406	48	12.107	83	3.406
14	16.316	49	11.892	84	3.211
15	16.227	50	11.660	85	3.009
16	16.145	51	11.409	86	2.830
17	16.067	52	11.151	87	2.685
18	15.988	53	10.892	88	2.597
19	15.905	54	10.624	89	2.495
20	15.818	55	10.347	90	2.339
21	15.727	56	10.063	91	2.321
22	15.629	57	9.771	92	2.412
23	15.526	58	9.478	93	2.517
24	15.417	59	9.199	94	2.569
25	15.304	60	8.940	95	2.596
26	15.188	61	8.712	96	2.555
27	15.065	62	8.487	97	2.423
28	14.942	63	8.258	98	2.278
29	14.827	64	8.016	99	2.045
30	14.723	65	7.765	100	1.624
31	14.617	66	7.503	101	1.192
32	14.506	67	7.227	102	0.753
33	14.387	68	6.941	103	0.317
34	14.260	69	6.643		

Calculate the interest at 5 per cent. for one year upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of each person in said sum.

EXAMPLES.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350.75. One-third of this is \$116.91 $\frac{2}{3}$. In-

terest on \$116.91 for one year at 5 per cent. (as fixed by the 70th Rule) is \$5.85. The number of years' purchase which an annuity of \$1.00 is worth at the age of 37, as appears by the table, is 13 years and 843-1000 parts of a year, which, multiplied by \$5.85, the income for one year, gives \$80.98 and a fraction as the gross value of her right of dower.

Suppose a man whose age is 50 is tenant by the curtesy in the whole of an estate worth \$9,000. The annual interest on the sum at 5 per cent. is \$450. The number of years' purchase which an annuity of \$1.00 is worth at the age of 50, as per table, is 11.660 parts of a year, which, multiplied by \$450, the value of one year, gives \$5,247 as the gross value of his life estate in the premises, or the proceeds thereof.

NOTE.—The values in this table are calculated on the supposition that the annuities are payable yearly, first payment due one year hence. These values with those for joint and survivorship life interest, may be found in "Commutation Tables for Joint Annuities and Survivorship Assurances Based on the Carlisle Mortality, by David Chisholm." London, Charles and Edwin Layton, 1858.

Taken from Bender's Lawyers' Diary.

¶ 313 Life Tenant and Remainderman; Apportionment of Rents, Annuities, and Dividends.

Apportionment of rents, annuities and dividends.

All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of

such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, becomes due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description.

Former § 2720.

§ 2674, Code Civ. Pro.

When rent is apportionable.

Where a tenant for life, who shall have demised the real property, dies before the first rent day, or between two rent days, his executor or administrator may recover the proportion of rent which accrued to him before his death.

§ 222, Real Property Law.

Rents and income. See ¶ 195.

The executor or administrator is entitled to and should inventory in certain cases a part of rents, annuities, and dividends, which accrued during the life of the deceased as provided in section 2720, Code Civ. Pro. Where a life use of property terminates it is necessary to make a proper apportionment between the representative of the deceased life tenant or beneficiary and the remainderman.

By the common law, where testator had given his wife a life estate in real property with remainder over, and he had leased said property, and the wife died before the quarter day when the rent was payable, the whole quarter's rent went to the remainderman, and no part could be apportioned to the widow's representatives. *Marshall v. Moseley*, 21 N. Y. 280.

A large fund was given in trust for the use of testator's daughter and upon her death bequeathed to various persons — *held*, that the executors of the daughter were entitled to receive the interest which had accrued on the money in the bank, and the securities from the date of the last payment of interest to her until the date of her death. *Smith v. Lansing*, 24 Misc. Rep. 566, 53 N. Y. Supp. 633. *Matter of Schnitzler*, 61 Misc. Rep. 218.

Where a widow is given the life use of the estate the interest on a judgment obtained against a legatee which is not collected until after the death of the widow should be apportioned to her estate to the time of her death. *Jennings v. Barry*, 6 Dem. 22, 19 N. Y. St. Rep. 786.

This section does not apply to the apportionment of rents between the estate of the owner who dies and the heirs or devisee, but between the successive takers of the realty. *Matter of Weeks*, 5 Dem. 194.

Mortgage foreclosure.

A lessor of premises sold under foreclosure before the expiration of the month cannot recover for the part of month before the sale, where the rent is not payable before the end of the month. *O'Neill v. Morris*, 28 Misc. Rep. 613, 59 N. Y. Supp. 1075.

Dividends.

Under an agreement to receive all the dividends declared on stock during donor's life — *held*, that a dividend declared after donor's death was not apportionable between his estate and the donees. *Matter of Kane*, 64 App. Div. 566, 72 N. Y. Supp. 333.

Apportionment of interest and income (except dividends upon stock not declared), made between estate of life tenant and remaindermen by carrying the account forward for ten months and deducting a proportionate part of taxes and expenses. *Matter of Young*, 23 Misc. Rep. 223, 50 N. Y. Supp. 402.

It would seem that there is no income accruing on a dividend paying stock which can be apportioned where the dividend is not declared while the stock is held by the executor or administrator.

Hyatt v. Allen, 56 N. Y. 553; *Matter of Kernochan*, 104 id. 618.

Widow having use of stock is entitled to the whole of an extra dividend declared during that time, even though some or all of it was earned before the death. *Matter of Kernochan*, 104 N. Y. 618.

Interest accruing to date of death.

The interest on a fund payable to a life beneficiary which accrues after the last payment up to the time of death is payable to the representative of the estate of the beneficiary. *Matter of Farmers' Loan & T. Co.*, 119 App. Div. 104.

Action to recover apportionment of rents, annuities and dividends.

It is provided in section 2674 that every person, and his executors, administrators and assigns, shall have a right of action to recover his proportionate part of any rents, annuities or dividends, which by such section are required to be apportioned to the respective parties in interest. Such action must be brought for the entire rents, annuities or dividends, so as to avoid a multiplicity of suits. But such section does not authorize an action in any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description.

¶ 314 Payment of Expenses and Taxes as Between Life Tenant and Remainderman.

Expenses.

Where the will directs payment of expenses, etc., from estate and gives the rest and residue to widow for life — *held*, that the expenses should come from the *corpus*. *Reynolds v. Reynolds*, 3 Dem. 82.

Taxes.

Proper rule for apportionment of expenses of maintaining real property as between life tenant and remaindermen, declared. *Cromwell v. Kirk*, 1 Dem. 599.

A direction to pay "all taxes" does not include a paving assessment. *Chamberlin v. Gleason*, 163 N. Y. 214; aff'g, 20 App. Div. 624, 46 N. Y. Supp. 1090.

Use of a farm, stock, tools, etc., devised to widow for a home for herself and infant children — *held*, that the widow was liable to pay taxes thereon. *Deraismes v. Deraismes*, 72 N. Y. 154.

Carrying charges of unimproved and of unproductive property held for the benefit of the remainderman should be paid from *corpus*. *Matter of Coombs*, 62 Misc. Rep. 597, 116 N. Y. Supp. 1129.

¶ 315 Proceeding for Production of Life Tenant; For Sale of Real Property Where there are Unknown Remaindermen.

A person entitled to claim real property, after the death of another who has a prior estate therein, may, not oftener than once in each calendar year, apply by petition to the supreme court, at a special term thereof, held within the judicial district wherein the property, or a part thereof, is situated, for an order directing the production of the tenant for life, as prescribed in this title, by a person, named in the petition, against whom an action of ejectment to recover the real property can be maintained, if the tenant for life is dead; or where there is no such person, by the guardian, husband, trustee or other person, who has, or is entitled to, the custody of the person of the tenant for life, or the care of his estate.

§ 2302, Code Civ. Pro.

The Code of Civil Procedure provides in detail for this proceeding in sections 2302 to 2319, which should be consulted.

Proceeding for sale of real property held by tenant for life with contingent remainder over to persons whose identity is unknown.

In any case where real property is devised by will to a person for life, with contingent remainder or remainders over, to persons the identity of whom cannot be definitely ascertained until the death of the person entitled to the life estate, the Supreme Court may by order, on such terms and conditions as seem just and proper, authorize the sale of such real property or any part thereof, and the avails thereof deposited for the use of such

life tenant. For the details of this proceeding, consult sections 67 to 71, Real Property Law.

¶ 316 Probate of Heirship.

The proceeding for probate of heirship is seldom used, and there seem to have been few reported cases construing the Code provisions relating thereto. The object of the proceeding is to make a record of the facts connected with the descent of real property and of the names and relationships to the deceased of the persons who are his heirs. Thus a record is made of these facts which might be difficult of proof after the lapse of many years. The decree may be used in evidence as *prima facie* proof of the facts therein established and its value as evidence increases with the lapse of time.

Effect of decree under former §§ 2654-2659.

In *Carroll v. Collins* (6 App. Div. 106, 74 N. Y. St. Repr. 667, 40 N. Y. Supp. 54), the appellate court in an action of partition refused to allow the decree on probate of heirship to prevail as presumptive evidence of the title of the plaintiff who claimed to be an adopted child of the deceased as against evidence in the partition action which did not prove a legal adoption.

In *Matter of Clarke* (131 App. Div. 688; aff'd, 195 N. Y. 613), a decree on probate of heirship obtained under an allegation that deceased left no heirs except the petitioner who claimed to have been adopted, was not given force to confirm the title of the husband who was not a party, and who claimed under a release from the State.

Probate of heirship under the revision.

Under the revision of 1914 probate of heirship may be had on judicial settlement, by taking proof as to who are the heirs at law or devisees, and establishing their rights and interests in that proceeding. That is a very proper time to make such proof as then the persons are alive who know the family history,

and the time is so close to the death of the ancestor, from whom the title comes, that the evidence can be readily obtained. See § 2711, ¶ 254. Where proof is not taken on the judicial settlement it may be made in the following manner:

Heir, etc., may apply to establish heirship.

Where a person, seized in fee of real property within the state, dies intestate, or without having devised his real property, his heirs, or any of them, or any person deriving title from or through such heirs, or any of them, may present to the surrogate's court which has acquired jurisdiction of the estate, or, if no surrogate's court has acquired such jurisdiction, then to the surrogate's court of the county where the real property, or any part thereof is situated, a petition, describing the real property, setting forth the facts upon which the jurisdiction of the court depends, and the interest or share of the petitioner, and of each other heir of the decedent, in the real property, and praying for a decree establishing the right of inheritance thereto, and that all the heirs of the decedent may be cited to show cause why the prayer of the petition should not be granted. Upon the presentation of such a petition a citation must be issued accordingly, except in a case where the petitioner was a party to a judicial settlement, the decree upon which determined the rights of the parties to such real estate.

§ 2765, Code Civ. Pro.

Effect of revision. § 2654 amended.

It will be noticed that this proceeding does not include a devisee, so that under it a devisee cannot prove his right to the real property devised. This omission has been supplied by including the devisee among those who may have their right to the property determined on judicial settlement (See § 2711, ¶ 254). Former § 2655 regarding citation and appearance repealed since the provisions of that section are now covered by general sections 2511, 2523, ¶¶ 20, 26.

What facts to be ascertained; decree thereupon.

Upon the return of the citation, the surrogate's court must hear the allegations and proofs of the parties and determine all the issues raised. The petitioner must establish the fact of the decedent's death; the place of his residence at the time of his death; his intestacy, either generally, or as to the real property in question; the heirs entitled to inherit the property in question; the name, age, residence and relationship to the decedent, of each; and the interest or share of each in the property. The surrogate, when these facts are established, must make a decree, describing the property,

and declaring that the right of inheritance thereto has been established to his satisfaction, in accordance with the facts, which must be recited in the decree.

§ 2766, Code Civ. Pro.

Effect of revision. § 2656 amended.

Under the new system with the complete jurisdiction, the surrogate's court is given the right to try and determine all the issues raised, either with or without a jury as the parties desire.

Decree to be recorded; effect thereof.

A certified copy of a decree, made as prescribed in the last section, may be recorded in the office of the clerk, or of the register, as the case requires, of each county in which the real property is situated, as prescribed by law for recording a deed, and, from the time when such copy is so recorded, the decree, or the record thereof, is conclusive evidence of the facts so declared to be established thereby against all parties to such proceeding.

§ 2767, Code Civ. Pro.

Effect of revision. § 2657 amended.

With the complete jurisdiction and the right to a jury trial if demanded, the decree is made conclusive on all persons who were parties to the proceeding. The requirement that the proofs be also recorded in the county clerk's office is a needless expense and serves no good purpose, as they can always be found in the surrogate's office. Former §§ 2658, 2659, concerning a future modification of the decree have been omitted, for after a jury trial such modification could not well be had.

¶ 317 Lands and Personal Property of Persons Dying Without Heirs or Next of Kin Revert to the State.

The people of the State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all land the title to which shall fail, from a defect of heirs, shall revert or escheat to the people.

Art. 1, § 10, N. Y. State Const.

Applies to personal estate.

The legislation of the State shows that the subject of escheat and the administration of estates of persons dying intestate

without heirs or next of kin have generally been treated together as analogous, and result in the appropriation by the State of all such property, both real and personal. There is no substantial difference between real and personal property in respect to the rights acquired by the State upon the death of its owner intestate without heirs or next of kin. *Johnston v. Spicer*, 107 N. Y. 185.

Proceedings to Recover for the State Lands Claimed to Have Escheated.

Attorney-General to bring ejectment for real property, escheated or forfeited.

Whenever the attorney-general has good reason to believe, that the title to, or right of possession of, any real property, has vested in the people of the state, by escheat, or by conviction or outlawry for treason, he must commence an action of ejectment, to recover the property.

§ 1977, Code Civ. Pro.

Notice to be published before trial or judgment.

The attorney-general must cause a notice, specifying the names of the parties, and the object of the action, and containing a brief description of the property affected thereby, to be published in the newspaper printed at Albany, in which legal notices are required to be published, in a newspaper published in the city of New York, and in a newspaper published in each county in which any part of the property is situated, at least once in each week, for twelve successive weeks, before an issue of fact, joined in the action, is brought to trial; or, where judgment is rendered therein in favor of the plaintiff, otherwise than upon the trial of an issue of fact, before final judgment is rendered.

§ 1978, Code Civ. Pro.

When unknown claimants may be made defendants.

If the property is not occupied, and no person is known to the attorney-general, as claiming title thereto, the defendant or defendants may be designated as "unknown claimants," without any other description. In all other respects, section 451 of this act applies to an action, in which the defendant or defendants are thus designated.

§ 1979, Code Civ. Pro.

Effect of judgment against unknown claimants.

Where, in an action of ejectment, to recover property alleged to be escheated, brought as prescribed in the last section, final judgment in favor of the people is rendered against unknown claimants, and the real property recov-

ered thereby is afterwards sold and conveyed, under the direction of the commissioners of the land office, the judgment is conclusive upon the title of that property, as against all persons, except those who commence an action of ejectment for the recovery thereof, or of a part thereof, within five years after the final judgment was rendered in the action in favor of the people, and the judgment roll was filed thereupon. But section 375 of this act applies to such an action.

§ 1980, Code Civ. Pro.

Attorney-General to report recoveries to commissioners of land office.

The attorney-general must, from time to time, make a report to the commissioners of the land office, of all real property recovered by the people, in any action brought pursuant to this article.

§ 1981, Code Civ. Pro.

Proceedings to Recover from the State Lands Escheated Either Through Lack of Heirs or on Account of Alienage.

Persons entitled to petition for release.

A petition for the release to the petitioner of any interest in real property, escheated to the state by reason of the failure of heirs, or the incapacity, for any reason except infancy or mental incompetency of any of the petitioners' alleged predecessors in interest to take such property, by devise or otherwise, or to convey the same, or by reason of the alienage of any person, who but for such alienage would have succeeded to such interest, may be presented to the commissioners of the land office within forty years after such escheat. Such petition may be presented:

1. By any person who would have succeeded to such interest but for his alienage or the alienage of another person, or
2. By the surviving husband, widow, step-father, step-mother or adopted child of the person whose interest has so escheated, or
3. By the purchaser at a judicial sale or sheriff's sale on execution, or
4. By an heir, devisee, assignee, grantee, immediate or remote, or executor of any person, who but for his death, assignment or grant could present such petition, or the alleged grantee of any person or of any association or body, whether incorporated or not, who or which would have succeeded by devise or otherwise to the title of such person but for his alienage or a legal incapacity to take or convey the property so escheated.

Such petition shall be verified by each petitioner in the same manner as a pleading in a court of record may be verified, and shall allege:

1. The name and residence of each person owning any interest in such real property immediately prior to the escheat;
2. The name and residence of each petitioner and the circumstances which entitle him to present such petition;
3. The name and place of residence of every person who would have succeeded to any such interest but for his alienage or the alienage of another or

any other rule of legal incapacity hereinabove mentioned affecting an attempted transfer of such interest to such person or to or by any of his alleged predecessors in interest;

4. The description and value, at the date of the verification of the petition, of such real property sought to be released;

5. The description and value, at the date of the verification of the petition, of all the property of every such owner, which shall have escheated to the people of the state by reason of failure of heirs or alienage and which shall not then have been released or conveyed by the state;

6. The name and residence of each person having or claiming an interest in such real property at the date of the verification of the petition and the nature and value of such interest;

7. Any special facts or circumstances by reason of which it is claimed that such interest should be released to the petitioner.

The petition may be filed within sixty days after its verification with the secretary of state, who shall present it to the commissioners of the land office at their next meeting thereafter, and who may call a meeting of the commissioners to consider the same.

§ 60, The Public Lands Law.

Making the Attorney-General party defendant in foreclosure against lands which have escheated to the State does not make the judgment of sale binding upon the State.

Proceedings on receipt of petition.

The commissioners of the land office shall determine the truth of the allegations of the petition; the value of the real property sought to be released, and the value of all the property of every such owner which shall have escheated to the state, and shall not have been conveyed or released by the state, and for that purpose the commissioners may take testimony and proof, either orally or by affidavits. They may, as a condition of hearing the matter, require the petitioners to produce witnesses or advance the expense of producing them.

§ 61, The Public Lands Law.

Conveyance to petitioner.

The commissioners may in their discretion, if they deem it just to all persons interested, execute, in the name of the state, a conveyance on such terms and conditions as the commissioners deem just, releasing to such petitioners the interest of the state so acquired in such real property so sought to be released. A conveyance so made to any such petitioner who is a parent, child, surviving husband or widow of any such owner of any interest therein immediately prior to the escheat, or the heirs-at-law of any such surviving husband or widow, or the alleged grantee of any person or of any association or body, whether incorporated or not, who or which would

have succeeded by devise or otherwise to the title of such person but for a legal incapacity to take or convey the property so escheated shall be without consideration, if the value, at the date of the petition, as determined by the commissioners, of all the property of any such owner escheated to the state and not conveyed or released by the state, shall not exceed one hundred thousand dollars, and of the property sought to be released shall not exceed ten thousand dollars. The conveyance shall contain a brief recital of the determinations required to be made by the commissioners on the hearing of the petition, and of all the terms and conditions on which the conveyance is made.

§ 62, The Public Lands Law.

Effect of deed on rights of others.

No such conveyance shall impair or affect any right, title, interest or estate in or to the lands thereby released, of any heir-at-law, devisee, grantee, mortgagee or creditor of any person having an interest in the real property released immediately prior to the escheat thereof, or of any person having a lien or incumbrance thereon, through, under or by any person having any interest therein immediately prior to the escheat.

§ 63, The Public Lands Law.

Protest; notice of hearing; petition.

Any person may file, at any time, with the secretary of state, a protest, stating his name, residence and post-office address, against the conveyance or release by the state of any interest of the people of the state, acquired by escheat in any real property described in such protest. The secretary of state shall present such protest to the commissioners of the land office at their next meeting thereafter, and the commissioners shall if practicable, cause a notice of their hearing of any petition for the conveyance or release of any such real property, to be given to each person filing such protest, in such manner as will enable such person to appear before them on such hearing. They may, in their discretion, cause like notice to be given to any other person, of the hearing of any petition for the release by the state of any interest of the people of the state in any real property acquired by escheat, or may cause notice of such petition to be given generally by publication in a newspaper published in the county in which such real property is situated.

§ 64, The Public Lands Law.

Lands held under written contract.

Where lands have been escheated to the state, and the person last seized was a citizen or capable of taking and holding real property, the commissioners of the land office shall fulfill any contract made by such person or by any person from whom his title is derived, in respect to the sale of such lands, so far only as to convey the right and title of the state, pursuant to such contract, without any covenants of warranty or otherwise, and shall

allow all payments which may have been made on such contracts. If any part of such escheated land has been occupied under a verbal agreement for the purchase thereof, and the occupants have made valuable improvements thereon, such agreement shall be as valid and effectual as if it were in writing.

§ 66, The Public Lands Law.

Escheated lands subject to trusts and incumbrances.

Lands escheated to the state for defect of heirs shall be held subject to the same trusts and incumbrances to which they would have been subject if they had descended.

§ 68, The Public Lands Law.

¶ 318 Descent of Real Property.

Who may take by descent.

Capacity to hold real property.

1. A citizen of the United States is capable of holding real property within this state, and of taking the same by descent, devise or purchase.

2. Alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native born citizens and their heirs and devisees take in the same manner as citizens; provided, however, that nothing herein contained shall affect the rights of this state in any action or proceeding for escheat instituted before May 19, 1897.

§ 10, Real Property Law.

Who are Heirs-at-Law.

General rule of descent.

The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives, as prescribed in the following sections of this article.

§ 81, Decedent Estate Law.

Effect of divorce.

M., who had been divorced in this State, married in New Jersey and removed to this State and died intestate. *Held*, that a son by the second marriage inherited real estate. *Moore v. Hege-man*, 92 N. Y. 521, aff'g, 27 Hun, 68.

Lineal descendants of equal degree.

If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

§ 82, Decedent Estate Law.

Lineal descendants of unequal degree.

If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

§ 83, Decedent Estate Law.

When father inherits.

If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

§ 84, Decedent Estate Law.

Descent; child dying without wife or descendants.

The father takes the whole real estate unless the mother be living and the inheritance came to the child from the mother, in which case the mother takes a life estate, if the child left brother or sister or their descendants, with remainder to such collateral relatives, but if there are no collateral relatives the mother takes the fee.

If the mother be dead, and the inheritance came through her, the father takes a life estate, if there are collateral relatives, with the remainder to them; and if there are no such relatives the father takes the fee.

The rule applies to the immediate ancestor from whom the intestate received the inheritance, and not a remote ancestor who

was the original source of title. *Richter v. Ludwig*, 39 Misc. Rep. 416, 80 N. Y. Supp. 16; *Wheeler v. Clutterbuck*, 52 N. Y. 67.

The statute looks only at the last possession of the inheritance and does not refer to the original source of title. *Valentine v. Wetherill*, 31 Barb. 655; *Hyatt v. Pugsley*, 23 id. 285; *Adams v. Anderson*, 23 Misc. Rep. 705, 53 N. Y. Supp. 141; *Emanuel v. Ennis*, 48 N. Y. Super. Ct. 430.

"On the part of the mother."

Held that an inheritance came to the intestate "on the part of the mother" within the meaning of the Statute of Descent, notwithstanding it came by deed in which \$1 consideration was named. *Morris v. Ward*, 36 N. Y. 587.

When mother inherits.

If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

§ 85, Decedent Estate Law.

Mother living.

Intestate dying without descendants and leaving no father — the real estate vests in the brothers living at the time of the death of the intestate and not of the mother. *Barber v. Brundage*, 169 N. Y. 368; aff'g, 50 App. Div. 123, 63 N. Y. Supp. 347.

Woman left husband, mother and brother, no children or descendants and no father; *held* that the real estate descended to the mother for life and the reversion to the brother in fee. *Berger v. Waldbaum*, 46 Misc. Rep. 4, 93 N. Y. Supp. 352.

When collateral relatives inherit.

If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

§ 86, Decedent Estate Law.

Brothers and sisters and their descendants.

If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

§ 87, Decedent Estate Law.

There being no nearer relatives, brothers and sisters and their descendants inherit in the first instance, and if there be none, then aunts and uncles of the intestate and their descendants take. *Matter of Davenport*, 172 N. Y. 454; aff'g, 67 App. Div. 191.

Brothers and sisters of father and mother and their descendants and grandparents.

If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it

shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents, then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents, then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents in equal parts.

§ 88, Decedent Estate Law.

Real property coming to an intestate from his mother goes to cousins on the mother's side to the exclusion of the father's brother. *Matter of McMillan*, 126 App. Div. 155; aff'd, 193 N. Y. 651.

To the children of the father's brothers and sisters, excluding second cousins. *Clements v. Babcock*, 26 Misc. Rep. 90, 56 N. Y. Supp. 527.

Illegitimate children.

If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

§ 89, Decedent Estate Law.

Effect of divorce and law of place of birth.

A child born out of wedlock, whose parents afterward married in a foreign State under a law by which such child was made legitimate, may inherit in this State. *Miller v. Miller*, 91 N. Y. 315.

Concerning effect of marriage and divorce on legitimacy of children, see ¶ 23.

Children of parents whose marriage has been annulled or dissolved.

The children of an innocent parent whose marriage has been annulled or dissolved as provided in § 1745, Code Civ. Pro., may inherit from such innocent parent. See Code Civ. Pro., § 1745.

Relatives of the half-blood.

Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

§ 90, Decedent Estate Law.

Half-blood.

Relatives of the half-blood take equally with those of the whole blood. *Beebee v. Griffing*, 14 N. Y. 235.

The Statute of Descent excludes persons from inheriting who are not of the blood of the "ancestor" from whom the property came. The word "ancestor" as there used refers to the immediate ancestor and embraces collaterals as well as lineals from whom the inheritance was derived. A half-brother, not of the blood of the "ancestor," excluded. *Wheeler v. Clutterbuck*, 52 N. Y. 67.

Relatives of husband or wife.

When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate.

§ 91, Decedent Estate Law.

Cases not hereinbefore provided for.

In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

§ 92, Decedent Estate Law.

Posthumous children and relatives.

A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

§ 93, Decedent Estate Law.

The burden of proving that a posthumous child was born alive is upon the person asserting the fact. *Matter of Smith*, 136 App. Div. 10; *Bender v. Terwilliger*, 48 App. Div. 371, 63 N. Y. Supp. 269; aff'd, 166 N. Y. 590.

Inheritance, sole or in common.

When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons, they shall take as tenants in common, in proportion to their respective rights.

§ 94, Decedent Estate Law.

Effect of Alienism. See ¶ 305.

2. Alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native-born citizens and their heirs and devisees take in the same manner as citizens; provided, however, that nothing herein contained shall affect the rights of this state in any action or proceeding for escheat instituted before May nineteenth, eighteen hundred and ninety-seven.

From § 10, Real Property Law.

Alienism of ancestor.

A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

§ 95, Decedent Estate Law.

Title through alien.

The right, title or interest in or to real property in this state now held or hereafter acquired by any person entitled to hold the same cannot be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise.

§ 15, Real Property Law.

Liabilities of alien holders of real property.

Every alien holding real property in this state is subject to duties, assessments, taxes and burdens as if he were a citizen of the state.

§ 16, Real Property Law.

Heirs of patriotic Indian.

The heirs of an Indian to whom real property was granted for military services rendered during the war of the revolution may take and hold such real property by descent as if they were citizens of the state at the time of the death of their ancestors. A conveyance of such real property to a citizen of this state, executed by such Indian or his heirs after March seventh, eighteen hundred and nine, is valid, if executed with the approval of the surveyor-general or state engineer and surveyor, indorsed thereupon.

§ 17, Real Property Law.

For a very thorough study of the rights of Indians see *Hatch v. Luckyman*, 64 Misc. Rep. 508.

CHAPTER XLVI.

Testamentary Trusts and Trustees; How Created and Terminated; Suspension of Power of Alienation; Powers in Trust.

- ¶ 319. § 2768. Testamentary trustee defined. Executor with trust duties. Testamentary trust defined.
- ¶ 320. § 96 (R. P.). Purposes for which trusts may be created.
- ¶ 321. § 93 (R. P.). Passive trusts.
Power in trust
- ¶ 322. § 92 (R. P.). Trustee and beneficiary the same person.
- ¶ 323. Trusts for support and maintenance.
- ¶ 324. Whether gift is absolute or in trust.
- ¶ 325. § 61 (R. P.). Accumulations.
- ¶ 326. Trust for care of cemetery lots.
- ¶ 327. Trusts for public purposes.
- ¶ 328. Trusts for charitable uses.
- ¶ 329. § 42 (R. P.). Suspension of power of alienation.
- ¶ 330. Suspension of power of alienation, effect of power of sale.
- ¶ 331. Trusts apparently for term of years.
- ¶ 332. § 15 (P. P.). Terminating trust.
Transfer of trust rights.
Merger of trust with title.
- ¶ 333. Terminating trust dependent upon conditions, or by operation of law.

¶ 319 Testamentary Trust and Testamentary Trustee Defined.

The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.

§ 2768, subd. 6, Code Civ. Pro.

Temporary administrator may act as trustee.

A temporary administrator may be authorized to perform certain duties devolving upon the trustee when there is delay in

the qualification of the trustee, such as to take possession of real property, collect rents, lease for one year, and do other acts, except to sell it, which are necessary to the preservation of the property and the protection of the trust estate. § 2600, Code Civ. Pro. (¶ 243).

Whether executor or trustee.

The duties of an executor and those of a trustee are well defined in *Drake v. Price* (5 N. Y. 430), as follows: "To take possession of all the goods and chattels and other assets of the testator, to collect the outstanding debts and legacies; to pay the debts and legacies and under the order of the surrogate to distribute the surplus to the widow and children or next of kin of the deceased. These acts embrace all the duties which appropriately belong to the executorial office. If any other duty is imposed upon the executor, or any power conferred, not appertaining to the duties above enumerated, a trust or trust power is created, and the executor becomes a trustee or the donee of a trust power. And such powers are conferred and such duties imposed upon him, not as incidents to his office of executor, but as belonging to an entirely distinct character—that of trustee. And in all such cases the trust and executorship are distinguishable and separate." Ordinarily the duties devolving upon an executor include, as stated, paying debts and legacies and collecting and reducing to possession the assets of the estate. These duties are usually completed within the year or eighteen months which the law allows for such purpose, unless under the terms of the will something remains to be done other than to then distribute the estate. Such duties are purely executorial. Where, however, in addition to the ordinary offices of administering upon the estate, there is a provision in the will that after a period fixed the property is to be held in trust, whether by the same or other persons, there then devolves upon such persons the duties of the trustee. *Matter of Union Trust Co.*, 70 App. Div. 5, 75 N. Y. Supp. 68.

Executor will be deemed a trustee although not designated as such. See ¶¶ 77, 105.

“The duty of investing and administering the share in question it is true is imposed upon persons who are designated as executors rather than trustees, but it is a very familiar rule that the duties imposed upon a person rather than the name applied to him in the will should measure his office and position, and that where the duties of a trustee are imposed upon a person he will be regarded as a trustee rather than an executor.” *Tobias v. Ketchum*, 32 N. Y. 319, 327; *Ward v. Ward*, 105 id. 68, 74.

A construction of a will that a trust was created having been acquiesced in by all parties, such construction will not be subsequently departed from. *Matter of Oltmans*, 53 Misc. Rep. 208, 104 N. Y. Supp. 472.

What Constitutes a Testamentary Trust.

To constitute a testamentary trustee it is necessary that some express trust be created by the will. Merely calling an executor or guardian a trustee does not make him such. Every executor and every guardian is in a general sense a trustee for he deals with the property of others confided to his care. But he is not a trustee in the sense in which that term is used in courts of equity and in the statutes. *Matter of Hawley*, 104 N. Y. 250-261.

The principles are well stated in *Hamilton v. Hamilton*, 135 App. Div. 454, 119 N. Y. Supp. 986, and applied to a class of cases which frequently arise in loosely drawn wills.

There are three essential elements of a valid trust of personal property:

1. A designated beneficiary.
2. A designated trustee, who must not be the beneficiary.
3. A fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee. *Brown v. Spohr*, 180 N. Y. 201; aff'g, 87 App. Div. 522; *Greene v. Greene*, 125 N. Y. 506; aff'g, 54 Hun, 93.

Implied trust.

Where duties imposed are active and render the possession of the legal estate in the executors convenient and reasonably necessary, a trust will be implied. *Robert v. Corning*, 89 N. Y. 225.

I order my executor to pay to J. F. and D. each the sum of \$5 a week until my youngest grandchild shall become of age — *held* to create a trust in the executor, saying it is sufficient if the intention to create the trust can be fairly collected from the instrument. *Sicker v. Sicker*, 23 Misc. Rep. 737, 53 N. Y. Supp. 106.

No words creating a trust, but one implied from the manifest intention of the testator. *Ward v. Ward*, 105 N. Y. 68.

A bequest of the interest on a fund during the life of a person, with no immediate gift of the fund and the appointment of a trustee, creates a valid trust. *Matter of Hecht*, 71 Hun, 62, 54 N. Y. St. Repr. 194, 24 N. Y. Supp. 540.

A trust may be created although a power of revocation or modification is reserved.

Neither the reservation of the power of revocation or modification renders a trust illegal. *Brown v. Spahr*, 87 App. Div. 522, 84 N. Y. Supp. 995; *aff'd*, 180 N. Y. 201.

Few things are better settled than that the reservation of a power of revocation is entirely consistent with the validity of a trust and does not work its destruction where the rights of creditors are not involved. *Von Hesse v. MacKaye*, 136 N. Y. 114; *aff'g*, 62 Hun, 458.

Such a trust may be created without writing, and the delivery of the property is sufficient to pass the title. *Gilman v. McArdle*, 99 N. Y. 451; *rev'g*, 17 J. & S. 463.

A note delivered to L. with instructions to deliver it to another upon death of the donor — *held*, to constitute a trust if not an absolute gift. *Langworthy v. Crissey*, 63 N. Y. St. Repr. 326, 31 N. Y. Supp. 85.

Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not es-

essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should be informed of the trust. *Martin v. Funk*, 75 N. Y. 134-138; *Sullivan v. Sullivan*, 161 id. 554; aff'g, 39 App. Div. 99, 56 N. Y. Supp. 693.

Testator delivered to defendant \$417.47 and requested him to use the same for certain purposes specified after testator's death — *held*, a valid trust and that the executor could not recover the fund. *Todd v. Vaughn*, 90 Hun, 70, 69 N. Y. St. Repr. 861, 35 N. Y. Supp. 457.

Requirement that legatee agree to specified conditions does not invalidate gift.

The fact that an agreement is made regulating the application of income received from personal property transferred to a corporation does not violate the statutory rule forbidding the suspension of the absolute ownership of personal property. Such agreement may provide that beneficiaries of the income may be selected by others than the corporation holding the fund if such application of the income is within the legal action of such corporation. *Tabernacle Bap. Ch. v. Fifth Ave. Bap. Ch.*, 60 App. Div. 327; aff'd, 172 N. Y. 598.

¶ 320 Purposes for Which Express Trusts May be Created.

An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;
2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;
3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;
4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

§ 96, Real Property Law.

Whether or not a trust is created under subdivisions 3 or 4, the test must be applied as to whether there is a devise to the trustee with power to collect the rents. *Stevens v. Fogle*, 73 Misc. Rep. 417, 130 N. Y. Supp. 1082.

¶ 321 Title and Estate of Trustees.

Trustee of passive trust not to take.

Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.

§ 93, Real Property Law.

This statute is limited to a passive trust for a person intended to have the whole and absolute use of the trust property, and does not apply to a gift to one person in one event, and to another in the alternative. *Matter of Martimes*, 65 Misc. Rep. 135, 121 N. Y. Supp. 106.

Where the trust is passive no title vests in the trustee, but goes directly to those entitled to the ultimate beneficial estate. *Jacoby v. Jacoby*, 188 N. Y. 124, 129; *Rawson v. Lampman*, 5 N. Y. 456; *Fisher v. Hall*, 41 N. Y. 416; *Woodgate v. Fleet*, 64 N. Y. 566, 573.

Trustee of express trust to have whole estate.

Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust.

§ 100, Real Property Law.

If in the instrument creating such a gift, grant, or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, or devised for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

From § 113, Real Property Law.

A similar provision as to personal property is found in section 12, Personal Property Law.

If the trustees refuse to execute the trust in some cases the title may vest in the Supreme Court, and upon that event the

Supreme Court will undertake the trust. *Rothschild v. Schiff*, 188 N. Y. 327; mod'g, 103 App. Div. 235.

Where by the terms of his will the testator having devised and bequeathed all the residue of his estate both real and personal, to have and to hold the same during the life of his wife, and to apply one-half of the net income to her use, and the other half to the use of his children, the direction to apply the income necessarily implies that the executors shall receive the rents and profits of the real estate, hence they must have been entitled to the possession, at least during the life of the testator's widow, the trust to receive and apply the rents and profits being one of those expressly authorized by statute; that the title to the property must be in the trustees. *Matter of Faile*, 51 Misc. Rep. 166, 100 N. Y. Supp. 856.

Gift of use of estate to wife during her life and then to testator's issue. A valid trust created for the life of the wife and to sell and divide the property on her death — *held*, that title in the trustee for the purpose of the trust would be presumed. *Toronto G. T. Co. v. Chicago, etc.*, 123 N. Y. 37.

Authority given to executor to rent, lease, insure, and repair real estate, coupled with an intention to create a trust, vests title in the executors. *Tobias v. Ketchum*, 32 N. Y. 319.

Death of trustee. See ¶ 80.

Upon the death of the trustee the title to the trust estate does not pass to the beneficiaries but to a new trustee. *Hart v. Goadby*, 138 App. Div. 160, 123 N. Y. Supp. 166.

Title in case of re-conversion or election to take the land. See ¶ 299.

Where the power to collect the rents ceases and the trust is at an end, the title which was in the trustees may be divested, and may vest in the beneficiaries, the trustees merely retaining a power of sale. *Fogarty v. Stange*, 72 Misc. Rep. 225, 129 N. Y. Supp. 610.

Partition.

It has been held that one trustee could not maintain partition against his co-trustee individually and as trustee. *Pattison v. Cusack*, 147 App. Div. 428, 131 N. Y. Supp. 795.

Power in trust.

An attempted trust may be treated as a power in trust, when neither the title nor possession in the trustee are necessary to carry out its purposes. *Close v. Farmers' L. & T. Co.*, 121 App. Div. 528, 106 N. Y. Supp. 329; aff'd, 195 N. Y. 92.

A void attempted trust may be held susceptible of execution as a power in trust. The purposes of a power in trust are unlimited, except that they must be lawful purposes. *Kondolf v. Britton*, 160 App. Div. 381, 145 N. Y. Supp. 791.

An invalid appointment of a testamentary guardian has been held to be valid as a power in trust. *Matter of Kellogg*, 187 N. Y. 355; rev'g, 110 App. Div. 472.

Where necessary to uphold a will a gift to trustees may be construed as a power in trust with legal title in the beneficiaries, and only such title in the trustees as is necessary to the performance of their duties. *Steinway v. Steinway*, 163 N. Y. 183-200; aff'g, 24 App. Div. 104.

By section 93 of the Real Property Law a passive trust vests no title in the trustee. So, by section 97 of that statute, where the trustee is not "empowered to receive the rents and profits," no estate vests in him. The estate passes directly to the heirs or devisees, "subject to the execution of the power."

A gift of rents and profits of land or the gift of the income arising from personal property vests such an estate in the devisee or legatee as conforms to the evident intention of the testator. *Durfee v. Pomeroy*, 154 N. Y. 583, 595.

See Real Property Law, §§ 97, 99, 105; *Matter of Arensberg*, 120 App. Div. 463, 104 N. Y. Supp. 1033; *Matter of Cooney*, 112 App. Div. 659, 98 N. Y. Supp. 676; *Sweeney v. Warren*, 127 N. Y. 426; *Weeks v. Cornwell*, 104 id. 325, 338; *Chamber-*

lain v. Taylor, 105 id. 185; *Konvalinka v. Schlegel*, 104 id. 125; *Foersch v. Schmitt*, 55 Misc. Rep. 608, 106 N. Y. Supp. 935; *Turco v. Trimboli*, 152 App. Div. 431, 137 N. Y. Supp. 343.

A power in trust to sell, is not well executed by an exchange of lands. *Turco v. Trimboli*, 152 App. Div. 431.

¶ 322 Is a Trust Void When the Same Person is Sole Trustee and Sole Beneficiary?

Every person, who by virtue of any grant, assignment, or devise, is entitled both to the actual possession of real property and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

From § 92, Real Property Law.

It has been said that in view of the statute the same person cannot be at the same time trustee and beneficiary of the same identical interest. Under such circumstances no valid trust is created.

In *Losey v. Stanley* (147 N. Y. 560), this proposition seems to have been doubted. In that case the court says: "We entertain some doubt whether a trust is void in its inception where the instrument creating the trust appoints the sole beneficiary the trustee, but we have no doubt that the appointment of the beneficiary as trustee by the court, on the death or resignation of the testamentary trustee, does not extinguish the trust. The incompatibility of the two relations united in the same person is evident. Whether a trust so constituted in the first instance may not be sustained, leaving it to the court to substitute a competent trustee, will need consideration when the question directly arises."

In *Woodward v. James* (115 N. Y. 346), Judge Finch says: "The objection is further pressed that the law will not imply a trust where, in the moment of its creation, it will be invalid, and that, as the same person cannot be both trustee and beneficiary, the trust to Mrs. James must fail. It is undoubtedly true that

the same person cannot be at the same time trustee and beneficiary of the same identical interest. To say that he could would be a contradiction in terms, as complete and violent as to declare that two solid bodies can occupy the same space at the same instant. Where, however, the trustee is made beneficiary of the same estate, both in respect to its quality and quantity, the inevitable result is that the equitable is merged in the legal estate, and the latter alone remains."

In *Hoffman House v. Foote* (172 N. Y. 348), Judge Cullen says: "That a party cannot well be trustee for himself is settled by the decision of this court in *Greene v. Greene*." It is true this statement is made in a dissenting opinion but this particular proposition was not controverted by the majority of the court.

The same judge makes the same statement in *Bull v. Odell*, 19 App. Div. 605, 46 N. Y. Supp. 306.

In *Mulry v. Mulry* (89 Hun, 531), Judge Ingraham says: "It has been held by the Court of Appeals that, where a trust is attempted to be created and the beneficiary, who is entitled to the beneficial interest in the trust, is created a trustee, no trust is, in effect, created, but that the person named as trustee and beneficiary takes the entire estate."

Reference may also be made to *The People ex rel. Collins v. Donohue*, 70 Hun, 317; *Losey v. Stanley*, 83 id. 420; *Tuck v. Knapp*, 42 Misc. Rep. 140, 85 N. Y. Supp. 1001; *Matter of Hitchins*, 39 Misc. Rep. 767, 80 N. Y. Supp. 1125.

When the trustee is also beneficiary.

Where the widow was named as sole trustee and sole beneficiary during her life, the trust was declared invalid, but it was held that the widow had a legal estate in the land for life and was entitled to the possession and the rents and profits thereof. *Jacoby v. Jacoby*, 47 Misc. Rep. 427; aff'd, 113 App. Div. 913, 100 N. Y. Supp. 1122.

If the beneficiary be appointed sole trustee, no trust would be created, but the beneficiary would take the fee. *Greene v.*

Greene, 125 N. Y. 506; aff'g, 54 Hun, 93; *Bull v. Odell*, 19 App. Div. 605, 46 N. Y. Supp. 306.

Case holding that where husband was beneficiary and trustee the fee did not pass, but the husband took a life estate with the right to use the principal for his support, the trust being void. *Rose v. Hatch*, 125 N. Y. 427; aff'g, 55 Hun, 457.

The appointment of the beneficiary as trustee by the court on the death or resignation of the testamentary trustee does not extinguish the trust. *Losey v. Stanley*, 147 N. Y. 560.

Trust held to be valid.

The courts have recognized the legality of certain trusts where the trustee occupied a dual capacity. *Martin v. Pine*, 79 Hun, 426; *Howland v. Clendenin*, 134 N. Y. 305, 310; *Raymond v. Rochester Trust Co.*, 75 Hun, 239; *Asche v. Asche*, 113 N. Y. 232; *Warner v. Durant*, 76 id. 133; *Mott v. Ackerman*, 92 id. 539; *Matter of Townsend*, 73 Misc. Rep. 481, 133 N. Y. Supp. 492.

Trustee not sole party interested.

A trust to support a brother and his "family" does not make the brother the sole beneficiary so that the trust becomes void where he is appointed the trustee. *First Nat. Bank v. Miller*, 24 App. Div. 551, 49 N. Y. Supp. 981; rev'd, 163 N. Y. 164, upon the ground that no exception presented any question for review.

Where a trust is created in the executors, or where the widow is one, for the benefit of the widow, the other executors must take exclusive control of the portion of the estate so held in trust for the widow. *Bundy v. Bundy*, 38 N. Y. 410.

Where the sole acting trustee is one of two or more beneficiaries of an indivisible trust fund, such trustee may legally act. *Sweet v. Schliemann*, 95 App. Div. 266, 88 N. Y. Supp. 916.

New trustee may be appointed.

It was suggested in *Matter of Townsend*, 73 Misc. Rep. 481, that where the executor and trustee was the beneficiary with the right to use the principal, a new trustee should be appointed after the fixing of the trust fund upon the accounting of the executor.

A trust cannot be executed by the sole beneficiary as trustee without either the appointment of a trustee under no disability, or the supervision of the execution of the trust, by the court; therefore where a widow was beneficiary and her cotrustee refused to qualify — *held* that the widow could not execute a deed of real estate included in the trust. *Haendle v. Stewart*, 84 App. Div. 274, 82 N. Y. Supp. 823.

Where a beneficiary is also a trustee vested with discretion, such beneficiary may still act as trustee, but the court will take upon itself the execution of the trust so far as the discretion of the beneficiary-trustee is concerned. *Rogers v. Rogers*, 111 N. Y. 228; *Irving v. Irving*, 21 Misc. Rep. 743, 47 N. Y. Supp. 1052.

¶ 323 Trusts for Support and Maintenance.**How trust executed.**

Trust for support and maintenance may be created providing that income or principal be applied either by the trustee personally or by paying over to the beneficiary to be by him applied without the supervision or control of the trustee. *Leggett v. Perkins*, 2 N. Y. 297.

There have grown up two methods of providing for beneficiaries under trusts of this class — one is to pay over the income to the beneficiary and the other is to use and apply the income for the benefit of the beneficiary. *Sherman v. Skuse*, 166 N. Y. 345–350, *aff'g*, 45 App. Div. 335.

Whether or not the trustee shall pay over the money to the beneficiary or personally use, apply, and disburse it for the benefit of the beneficiary, depends upon the language by which the

trust is created. The statute itself provides that trusts may be created to use and apply income, but often the language of the statute has not been followed, and we find a direction to pay over the income directly to the beneficiary.

The question arose very early whether a trust to pay over which did not carry with it the duty of actual personal application of the income by the trustee himself to the designated use of the trust fund was a valid trust, but after much discussion the Court of Appeals finally settled the question in favor of its validity. *Leggett v. Perkins*, 2 N. Y. 297; *Tucker v. Tucker*, 5 id. 408; *Cochrane v. Schell*, 140 id. 516. A trust may be created which carries with it a duty to make personal application of the funds as was the case in *Matter of McCormick* (40 App. Div. 73, 57 N. Y. Supp. 548). In *Matter of Smith* (35 N. Y. St. Repr. 705; aff'd, 126 N. Y. 641, without opinion), it was held that the language of the will required the trustee to personally apply part of the income, but that the residue should be paid over to the beneficiary, since a construction that did not authorize the use and payment over of the whole income would result in an invalid accumulation. *Matter of Fisk*, 45 Misc. Rep. 298, 92 N. Y. Supp. 394.

A trust may require the personal expenditure of the fund by the trustee or his personal discretion as to how much shall be paid over or used for the purpose of the trust. *Matter of McCormick*, 40 App. Div. 73; aff'd, 163 N. Y. 551, no opinion; *Matter of Smith*, 35 N. Y. St. Repr. 705; aff'd, 126 N. Y. 641, no opinion.

Where the will directs the trustee to determine how much the beneficiary ought to have for support, when such amount is determined and paid over as provided by the will, the responsibility of the trustee ceases and he is not charged with the duty of supervising the expenditure of the same. *Clark v. Clark*, 23 Misc. Rep. 272, 84 N. Y. St. Repr. 1041, 50 N. Y. Supp. 1041.

A testamentary trustee directed to apply income to the support and education of an infant may use discretion as to the amount

needed, and the balance unexpended may be paid to the general guardian of the infant for future needs. *Matter of McCormick*; 22 Misc. Rep. 309, 83 N. Y. St. Repr. 1119; aff'd, 40 App. Div. 73, 91 N. Y. St. Repr. 548; aff'd, 163 N. Y. 551, no opinion.

Trust for support was held to authorize application of sufficient income for support of the beneficiary even though he could earn his support by his own labor and was frugal and saving and had accumulated his own bank account. *Holden v. Strong*, 116 N. Y. 471.

Payment to guardian. See ¶ 351.

Application is often made by the guardian of an infant entitled to have income applied by the trustee to his support; for an order that the trustee pay over all or part of such income to the guardian. This should not be done where the direction in the will is that the trustee apply the income or part of it in his discretion. *Matter of Connolly*, 71 Misc. Rep. 388, 130 N. Y. Supp. 194.

Trust for support of insane person; power and duty of commission in lunacy.

A gift, grant, devise or bequest may be made to the Commission in Lunacy for the support and maintenance of any insane person as provided in subd. 2 of section 7 of the Insanity Law, which provides as follows:

Accept and hold in behalf of the state, if for the public interest, a grant, gift, devise or bequest, of money or property, to the state of New York, to the commission in lunacy, or to any state hospital or the managers thereof, heretofore or hereafter made in trust for the maintenance or support of an insane person or persons in a state hospital or hospitals, or for any other legitimate purpose connected with any such hospital or hospitals. The commission shall cause each said gift, grant, devise or bequest to be kept as a distinct fund, and shall invest the same in the manner provided by the laws of this state as the same now exist, or shall hereafter be enacted, relating to securities in which the deposits in savings banks may be invested. But the commission may, in its discretion, deposit in a proper trust company or savings bank during the continuance of the trust, any fund so left in trust for the life of a single person, and shall adopt rules and regulations governing the deposit, transfer or withdrawal of such fund. The commission shall on the expiration of any trust as provided in any instrument creating the same, dispose of the fund thereby created in the manner provided in such instrument.

The commission shall include in its annual report a statement showing what funds are so held by it and the condition thereof.

Trust for support in the nature of an incumbrance. See ¶ 300.

A devise to one person subject to the support and maintenance of another does not create a trust, but an incumbrance. The title vests so that the devisee can convey the property subject to the incumbrance. *Downer v. Church*, 44 N. Y. 647.

A father gave by will to his three sons his real estate and provided as follows: "I furthermore order, as long as my two youngest daughters remain single, my house shall be their home, free of expense as to paying any rent or privilege in said house." *Held*, a provision for support as well as a place to live. *Lyon v. Lyon*, 65 N. Y. 339.

When executor is given discretion as to use of funds for support.

Where testator left an estate of \$20,000 and made the following provision for his wife: "I give and bequeath to my wife during her natural life the interest of \$3,000 or so much of said interest as my executors may deem necessary for her comfort," and the widow had an agreement with her son to furnish her board and lodging—*held*, that the widow was entitled to the legacy. *Torman v. Whitney*, 2 Keyes, 165.

Where the beneficiary is incompetent and a committee has been appointed, the trustee, if he determines that the beneficiary needs a certain amount of the principal, may pay the same over to the committee. When such amount is determined and paid over, the responsibility of the trustee ceases and he is not charged with the duty of supervising the expenditure of the same. *Matter of Fisk*, 45 Misc. Rep. 298; *Clark v. Clark*, 23 Misc. Rep. 272, 50 N. Y. Supp. 1041.

Where the will gives the widow the right to call upon the principal for support, and in another clause gives her discretion to use the principal, and she becomes insane, the latter clause will be ignored and payment ordered to the committee. *Beebe v. Bellamy*, 57 Misc. Rep. 511, 109 N. Y. Supp. 941.

Power of surrogate to direct trustees.

The surrogate has no power to entertain an application seeking instructions or directions as to the manner of the execution of a trust. *Matter of Foster*, 30 Misc. Rep. 573, 63 N. Y. Supp. 1102.

Trustees who have held real estate without converting it for many years until the market has fallen ought to apply to the Supreme Court for instruction regarding their duty, etc. *In re Fargo*, 20 Misc. Rep. 137, 45 N. Y. Supp. 732.

Where a will gives property in trust for minor children and directs the trustees to apply from each share so much as may be necessary for the support, maintenance and education of each child, the surrogate may fix the amount to be applied. *Matter of Goodwin*, 122 App. Div. 800, 107 N. Y. Supp. 784.

¶ 324 Direct Bequest May be Cut Down, or Gift of Income May Carry Title.

Direct gift may sometimes be cut down to a trust interest.

A will gave John B. a share of the estate absolutely, and then read, "I hereby direct that the share due my brother, John B., be invested by my executors for his benefit during his natural life, and for the benefit of his wife and his issue after his death" — *held*, that the absolute gift was not cut down by the subsequent sentence, and that the latter created a valid trust in the executors making John B. a life beneficiary. *Mee v. Gordon*, 187 N. Y. 400; *rev'g*, 104 App. Div. 520.

Gift to daughter with direction that another use income for support until daughter becomes sane — *held* to be valid. *Matter of Prier*, 75 Misc. Rep. 53, 134 N. Y. Supp. 865.

Not a trust.

A devise of the legal estate to one person carries with it the right to the rents and profits, and where another person is named as trustee to take charge of the property, no valid trust is created. *Beck v. McGillis*, 9 Barb. 35.

Gift of bonds to son H., followed by a direction that such bonds be held in trust for H. and a desire that L. should act as

trustee, with a gift over — *held*, an absolute gift to H. *Williams v. Boul*, 101 App. Div. 593; *aff'd*, 184 N. Y. 605.

Where testator gave a portion of his property directly to his son, and designated his executors as trustees and guardians of such son — *held*, that no trust was created thereby. *Matter of Hawley*, 104 N. Y. 250.

Income given absolutely to a daughter at times incompetent, with direction that trustees receive same at such times and apply to the use of the incompetent, *held* not to be a trust but that unexpended income belonged to the estate of the deceased incompetent. *Bloodgood v. Lewis*, 69 Misc. Rep. 269, 126 N. Y. Supp. 796. See also S. C. 209 N. Y. 95.

Gift of use or income may be construed to be absolute even though held in trust. See ¶¶ 279, 280.

“The testator directs that one-half of the rest, residue, and remainder of his estate be held in trust, be invested, and that the income and so much of the principal as shall be deemed necessary be applied to the education, maintenance, and support of his grandnieces and grandnephews. There is no other disposition of such moiety. I think that there is a gift of the principal of that one-half to the said beneficiaries.” *Earl v. Grim*, 1 Johns Ch. 494; *Paterson v. Ellis*, 11 Wend. 260, 298; *Smith v. Post*, 2 Edw. Ch. 523, 526; *Hatch v. Bassett*, 52 N. Y. 359, 362; *Bishop v. McClelland*, 44 N. J. Eq. 450; *Matter of Smith*, 131 N. Y. 239. In *Bishop v. McClelland* (*supra*), the vice-chancellor says: “There can be no doubt that a gift of the interest, income, or produce of a fund, without limitation as to continuance, or without limit as to time, will, according to a settled rule of construction, be held to pass the fund itself, and this will be the effect given to a gift made in this form, whether the gift be made directly to the legatee or through the intervention of a trustee.” *Matter of Ingersoll*, 95 App. Div. 211, 88 N. Y. Supp. 698.

A devise to trustees to pay all debts and then pay over to persons to be selected by a majority of the trustees — *held*, to be

valid as a trust to pay debts and that the residue went to the trustees absolutely. *Trunkey v. Van Sant*, 176 N. Y. 535; rev'g, 83 App. Div. 272, 82 N. Y. Supp. 94.

Gift of bonds to son — direction that they should be held as trust, etc., until he was thirty years old — *held*, no trust. *Williams v. Boul*, 101 App. Div. 593; aff'd, 184 N. Y. 605.

A trust in real or personal property cannot be created on an estate for life of any other person than the grantee or devisee of such estate, unless such remainder be in fee. Real Property Law, § 44; *Manice v. Manice*, 43 N. Y. 303; *Matter of Bogardus*, 43 Misc. Rep. 473, 89 N. Y. Supp. 478.

Where the will gave the residue to a trustee for the maintenance and education of testator's child, and made no bequest over — *held*, that the title vested in the children. *Matter of De Rycke*, 99 App. Div. 596, 91 N. Y. Supp. 159.

Bequest to trustee for his use during his life and for the benefit of his wife and issue after his death — *held*, that the trustee had a life use and the wife and issue the title. *Mee v. Gordon*, 45 Misc. Rep. 259, 92 N. Y. Supp. 159.

Devise to F. V. in trust for the support of himself and children and F., the children on arriving at twenty-five years of age to be entitled to their shares — *held*, no valid trust. *Treat v. Vose*, 63 App. Div. 338, 71 N. Y. Supp. 507.

Effect of power of sale.

Will provided: I give full power and authority and control to sell my property in B. to my sister Mrs. C., and to receive the rent of it — *held*, that the power of sale did not prevent the vesting of the fee in the sister. *Jennings v. Conboy*, 73 N. Y. 230.

¶ 325 Accumulation of Income from Either Real or Personal Property. See ¶ 353.

Sections 61 and 63 of the Real Property Law provide as follows:

All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of

rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority.

3. If in either case hereinbefore provided for such direction be for a longer term than during the minority of the beneficiaries it shall be void only as to the time beyond such minority. * * *.

From § 61, Real Property Law.

When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.

§ 63, Real Property Law.

Similar provisions are found in the Personal Property Law, § 16.

Incidental accumulation may be disregarded.

Where the primary disposition of an estate is in accordance with the rules of law, provision restricting the division, sale, and conveyance of real estate, void for repugnancy, and a void provision respecting an accumulation, may be disregarded, where they can be separated from the other parts without doing violence to the testator's general intention. *Oxley v. Lane*, 35 N. Y. 340; *Lovett v. Gillender*, id. 617; *Harrison v. Harrison*, 36 id. 543, distinguishing 9 id. 403; *Endress v. Willey*, 52 Misc. Rep. 388, 102 N. Y. Supp. 71; *Smith v. Chesebrough*, 176 N. Y. 317.

Where the provisions of a will are lawful and complete in themselves, and the accumulation arises in consequence of the fact that the income is larger than the sum directed to be paid by the testator, which fact may be occasioned either by the mistake of the testator or by the enhanced income derived from the capital, such

direction will not be declared invalid, but the courts will simply order that the accumulations be paid over to the persons entitled thereto. *Tweddell v. New York Life Ins. Co.*, 82 Hun, 602, 31 N. Y. Supp. 764. The most recent case on this subject is *Reeves v. Snook* (86 App. Div. 303, 83 N. Y. Supp. 746). This decision not only upholds the foregoing rule, but declares that the accumulated income shall go "to the persons presumptively entitled to the next eventual estate." To the same effect is *Cook v. Lowry* (95 N. Y. 103).

Accumulation for benefit of unborn child or infant.

It will be observed that under the statute, whether it be real property or personal property, the accumulation of income or profits in order to be valid must be for the benefit of one or more minors then in being. While an accumulation for the benefit of an unborn child, which commences after its birth and terminates during its minority, is lawful, the statute does not permit an accumulation for the benefit of an unborn child where the accumulation is to commence before its birth. *Manice v. Manice*, 43 N. Y. 303, 376; *Haxtun v. Corse*, 2 Barb. Ch. 506, 518; *Kilpatrick v. Johnson*, 15 N. Y. 322; *U. S. Trust Co. v. Soher*, 178 N. Y. 442.

Accumulation arising under a trust leaving the amount of income to be used for the support of the beneficiary to the discretion of the trustees goes to the taker of the next eventual estate. *Matter of Van Doren*, 77 Misc. Rep. 44, 137 N. Y. Supp. 420.

Anticipation of directed accumulation. See ¶ 353.

Section 17 of the Personal Property Law and section 62 of the Real Property Law authorize an order directing the advancement for the support of the infant from accumulation directed to be made for his benefit.

Accumulation to pay mortgage.

Bequest of rents and income to widow for life, and then part of the same to his daughter and balance to be applied to paying off mortgage on real estate which comprised part of the trust —

held, invalid accumulation. *Lowenhaupt v. Stanisics*, 95 App. Div. 171, 88 N. Y. Supp. 537.

A direction to invest surplus income in bond and mortgage until the termination of two lives upon which a trust depends is an unlawful accumulation. *Kirk v. McCann*, 117 App. Div. 56, 58, 101 N. Y. Supp. 1093.

A direction in the will that no interest should be collected on a mortgage against the property of testator's wife during her life was held to be the gift of such income and not an accumulation. *Matter of Harteau*, 53 Misc. Rep. 201, 104 N. Y. Supp. 586; *aff'd* upon this point 125 App. Div. 710.

Trust for providing annuity for wife with balance of income to be applied to the reduction of a mortgage upon the trust real estate — *held*, that the provision for applying the rents to the discharge of the mortgage was invalid. *Hascall v. King*, 162 N. Y. 134.

Reduction of mortgage invalid. *Matter of Jenkins*, 132 App. Div. 339, 117 N. Y. Supp. 74.

For term of years.

A direction to accumulate income of real estate for two years is invalid. *Smith v. Chesebrough*, 82 App. Div. 578, 81 N. Y. Supp. 570; *aff'd* on this point in 176 N. Y. 317.

Accompanied by gift over to adults.

Accumulation of the income of real and personal property for the benefit of minors, accompanied by a gift over to other persons, is not valid. *Pray v. Hegeman*, 92 N. Y. 508.

When income is to be merged in principal.

When the income must be added to the principal and the whole thereof may go to adults on the death of the minor, it is void and the income may be paid to the minor. *Barbour v. DeForest*, 95 N. Y. 13.

Death of minor.

Income as it accumulates vests in the minor and upon his death, prior to becoming of age, it goes to his estate, and does not follow the principal of the fund. *Smith v. Campbell*, 75 Hun, 155, 159, 58 N. Y. St. Repr. 182, 26 N. Y. Supp. 1087.

Where all the income was given to a daughter but later in the will were directions to accumulate, it was held that the will would be construed so as to make it valid, and that any unpaid income went to the representatives of the deceased beneficiary and not to the other persons named. *Matter of Hoyt*, 116 App. Div. 217, 101 N. Y. Supp. 557.

A legacy with its accumulation given to a minor and payable upon his arriving at twenty-one years of age vests upon death of testator subject to being divested. *Matter of Lehman*, 2 App. Div. 531, 74 N. Y. St. Repr. 268; *Matter of O'Reilly*, 59 Misc. Rep. 136, 112 N. Y. Supp. 208.

Next eventual estate.

Under the Real Property Law to which we have called attention, the surplus income is required to be paid over to the persons who are "presumptively entitled to the next eventual estate." In order to determine who are the persons entitled to the next eventual estate we must examine the provisions of the will. In the case of *Phelps' Excr. v. Pond* (23 N. Y. 69, 84), Selden, J., after discussing the applicability of this statute to the next eventual estate created by the will in that case, says: "The case cannot, therefore, in any view be brought within the provisions of the statute, and hence, if, after deducting the payments for any year from the income of that year a surplus of income should remain that surplus would belong, not to the residuary legatees, but to the next of kin. In England, income unlawfully accumulated goes to the heirs or next of kin as in cases of intestacy. Such would be the rule in this country were it not for the statute to which we have referred. *Cochrane v. Schell*, 140 N. Y. 516, 539. If, therefore, the provisions of the will do not bring the case within the provisions of this statute the

surplus must be disposed of either under the Statute of Descents or of Distribution. The statute does not say the ultimate, but the next eventual estate. *Manice v. Manice* (*supra*), 385; *U. S. Trust Co. v. Soher*, 178 N. Y. 446.

Where an accumulation is void and there is a residuary clause, such invalid accumulation passes thereunder. *Endress v. Willey*, 52 Misc. Rep. 388, 102 N. Y. Supp. 71.

¶ 326 Religious Corporation Owning Cemetery May Hold Trust Funds for Care of Lots Therein. See ¶ 272.

"A religious corporation * * * may take and hold any property granted, given, devised or bequeathed to it in trust to apply the same or the income or proceeds thereof, under the direction of the trustees of the corporation, for the improvement or embellishment of such cemetery or any lot therein, including the erection, repair, preservation or removal of tombs, monuments, gravestones, fences, railings or other erections, or the planting or cultivation of trees, shrubs, plants, or flowers in or around any such cemetery or cemetery lots."

From § 7, Religious Corporations Law.

In *Driscoll v. Hewlett*, (132 App. Div. 125; aff'd, 198 N. Y. 297), it was held that this statute sustained the validity of a trust created in the religious corporation owning a cemetery to apply the income of a fund to the care of a burial lot therein.

Cemetery association may be trustee.

The Legislature of 1909, realizing that the perpetual care of cemetery lots was a proper matter for a person to provide for in cases where the cemetery corporation had not established a perpetual care plan, authorized the creation of a trust in both real and personal property for such object. See section 13a of the Personal Property Law, and section 114a of the Real Property Law.

Trusts for care of cemetery lots, et cetera.

Gifts, grants and bequests of personal property, in trust for the purpose of perpetual care and maintenance, improvement or embellishment of private burial lots, in or outside of cemeteries, and the walks, fences, monuments, structures and tombs thereon are permitted and shall be deemed to be for charitable and benevolent uses; and shall not be deemed to be invalid by

reason of any indefiniteness or uncertainty of the persons designated as beneficiaries in the instrument erecting the same, nor shall they be deemed invalid as violating any existing laws against perpetuities or suspension of the power of alienation of title to property. But nothing herein contained shall affect any existing authority of courts to pass upon the reasonableness of the amount of such gift, grant or bequest. Any cemetery association may act as trustee of and execute any such trust with respect to lots, walks, fences, monuments, structures and tombs both within its own cemetery limits and outside of any cemetery under its control, but within the county where such cemetery is located, whether such power be otherwise included in its corporate powers or not.

§ 13a, Personal Property Law.

Such a trust may be created for the care of a burial lot located in another State. *Matter of Perkins*, 68 Misc. Rep. 255, 124 N. Y. Supp. 998.

Cases no longer applicable.

On account of the new enactments above referred to the following cases holding that no trust could be created for such purposes are no longer applicable: *Pfaler v. Raberg*, 3 Dem. 360; *Matter of Murray*, 34 Misc. Rep. 39, 69 N. Y. Supp. 491; *Read v. Williams*, 125 N. Y. 560; *Matter of DeWitt*, 113 App. Div. 790, 99 N. Y. Supp. 415; *Matter of Schuler*, 1 Pow. Sur. Rep. 490; *Matter of Waldron*, 57 Misc. Rep. 275, 109 N. Y. Supp. 681.

¶ 327 Trusts for Public Purposes.

Support of poor.

A bequest to the supervisor of a town and his successors in office, in trust, the income to be used in the support of poor widows and orphans as he may deem proper, is void for indefiniteness. *Matter of Botsford*, 23 Misc. Rep. 388, 52 N. Y. Supp. 238; aff'd, 37 App. Div. 73, 55 N. Y. Supp. 495.

Bequest to a town to be kept as a fund for the support of the poor of said town is void. *Fosdick v. Town of Hempstead*, 125 N. Y. 581.

A bequest to a church authorized to take by bequest, of money to "buy coal for the poor of said church"—held valid. *Bird v. Merkle*, 144 N. Y. 544; rev'g, *Schell v. Merkle*, 75 Hun, 74; dist'g, *Fosdick v. Town of Hempstead*, 125 N. Y. 581.

Public monument.

A provision for setting apart a fund for the erection of a monument on a village green which fails to designate a person to carry out the bequest is invalid; likewise a provision for a public library. *Beecher v. Yale*, 45 N. Y. Supp. 622.

A bequest for the erection of a statue in a public park in Brooklyn by the executors was held to be valid. *Matter of Hartneau*, 125 App. Div. 710; aff'd, 204 N. Y. 292.

Direct gift valid. See ¶ 273.

A bequest for charitable uses made directly to a corporation, although expressed to be in trust, is a direct gift and, therefore, valid. *Matter of Leo-Wolf's Estate*, 25 Misc. Rep. 469, 55 N. Y. Supp. 650.

Trusts of real and personal property for certain public purposes authorized.

1. Personal property may be granted, bequeathed, and conveyed to any incorporated college or other literary incorporated institution in this state, to be held in trust for any one or more of the following purposes:

- (1). To establish and maintain an observatory;
- (2). To found and maintain professorships and scholarships;
- (3). To provide and keep in repair a place for the burial of the dead; or
- (4). For any other specific purposes comprehended in the general objects authorized by their respective charters.

The said trusts may be created, subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by said trustees, and all property which shall hereafter be granted to any incorporated college or other literary incorporated institution in trust for any of the aforesaid purposes, may be held by such college or institution upon such trusts, and subject to such conditions and visitations as may be prescribed and agreed to as aforesaid.

2. Personal estate may be granted, bequeathed, and conveyed to the corporation of any city or village of this state, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation.

3. Personal estate may be granted, or bequeathed to commissioners of common schools of any town, and to trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the schools of such district.

4. The trusts authorized by this section may continue for such time as may be necessary to accomplish the purposes for which they may be created.

§ 13, Personal Property Law.

1. Real property may be granted, devised, and conveyed to any incorporated college or other literary incorporated institution in this state, to be held in trust for any one or more of the following purposes:

- (1). To establish and maintain an observatory;
- (2). To found and maintain professorships and scholarships;
- (3) To provide and keep in repair a place for the burial of the dead; or
- (4). For any other specific purposes comprehended in the general objects authorized by their respective charters.

The said trusts may be created, subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by said trustee, and all property which shall hereafter be granted to any incorporated college or other literary incorporated institution in trust for any of the aforesaid purposes, may be held by such college or institution upon such trusts, and subject to such conditions and visitations as may be prescribed and agreed to as aforesaid.

2. Real estate may be granted, devised, and conveyed to the corporation of any city or village of this state, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation may be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

3. Real estate may be granted or devised, to commissioners of common schools of any town, and to trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the schools of such district.

4. The trusts authorized by this section may continue for such time as may be necessary to accomplish the purposes for which they may be created.

§ 114, Real Property Law.

General municipal law authorizing trusts for public parks and libraries.

There are found in the General Municipal Law, art. VII, §§ 140–146, provisions for giving and devising real and personal property to trustees for the purpose of creating and maintaining public parks and public libraries. The trustees so named become a corporation for the purposes specified.

¶ 328 Trusts for Charitable Uses. See also ¶ 273.

1. No gift, grant, or bequest to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, or bequest, there is a trustee named to execute the same, the legal title to the property given, granted, or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such property shall vest in the supreme court.

2. The supreme court shall have control over gifts, grants and bequests in all cases provided for by subdivision one of this section, and, whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant or bequest to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant or bequest shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein; provided, however, that no such order shall be made without the consent of the donor or grantor of the property if he be living.

3. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the courts. * * *.

From § 12, Personal Property Law.

A similar provision is found in section 113, Real Property Law, concerning grants and devises of real property. These sections contain former chapter 701, Laws of 1893, and chapter 291, Laws of 1901 hereinafter referred to in the text of decisions.

The effect of this statute, as demonstrated in the case of *Allen v. Stevens* (161 N. Y. 122), was to restore the ancient doctrine of charitable uses and trusts as a part of the law of this State.

The act of 1893 doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain, but a trust may be so indefinite and uncertain in its purposes as distinguished from its beneficiaries as to be impracticable, if not impossible for the courts to administer.

There must be some limitation upon the power of a testator to make a valid trust, if he leaves his objects and purposes undefined and the beneficiaries indefinite and uncertain. *Matter of Shattuck*, 193 N. Y. 446; rev'g, 118 App. Div. 888.

Where a charitable intent is plain, but the beneficiary is uncertain, a trust may arise under chapter 701, Laws of 1893, which will vest in the Supreme Court. *Bowman v. Domestic & F. M. S.*, 182 N. Y. 494; mod'g, 100 App. Div. 29.

Where there is a gift to a corporation and it is probable that a certain corporation is the one intended, the gift may be held valid and the Supreme Court may appoint such corporation as trustee as the "medium best adapted to accomplish the end sought" under Laws of 1893, chapter 701, and Laws of 1901, chapter 291. *Kingsbury v. Brandegee*, 113 App. Div. 606, 100 N. Y. Supp. 353.

Bequest to a person "to use as he may desire in the Master's work" is not saved by the statute, and is void as a trust. *Matter of Seymour*, 67 Misc. Rep. 347, 124 N. Y. Supp. 637.

A bequest read as follows: "I desire my executors to divide the surplus among such American charities they may think well of, and I would like their names to be given to any society that assist poor needlewomen (seamstresses) whose toil is so poorly requited" — held, that the object was not too indefinite and that a trustee might be appointed. *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149; aff'd, 201 N. Y. 546.

A trust for a well recognized charity known as "Settlement Work," upheld. *Starr v. Selleck*, 145 App. Div. 869, 130 N. Y. Supp. 693; aff'd, 205 N. Y. 545.

A gift to trustees to be applied in their discretion, upheld. *Matter of Cunningham*, 76 Misc. Rep. 120, 136 N. Y. Supp. 922; aff'd, 206 N. Y. 601; *Matter of Davis*, 77 Misc. Rep. 72, 137 N. Y. Supp. 427; aff'd, 156 App. Div. 911, 141 N. Y. Supp. 1115.

An unincorporated society cannot take. See ¶¶ 275, 305.

An unincorporated voluntary association or society is incapable of taking a direct bequest to it. *White v. Howard*, 46 N. Y. 144;

Sherwood v. American Bible Society, 1 Keyes, 561; *Fairchild v. Edson*, 154 N. Y. 199; *Murray v. Miller*, 178 id. 316.

The act of 1893 did not change the rule laid down in the cases last above cited and in many kindred cases, except *Matter of Fitzsimmons* (29 Misc. Rep. 731, 62 N. Y. Supp. 1009), but in that case the learned surrogate contented himself simply with the expression of his opinion that under the provisions of the law of 1893 the fact that a religious or charitable society was unincorporated did not prohibit it from taking an absolute bequest to it. It seems that there is nothing in the statute that warrants the conclusion he reached. The statute saves a gift, grant, bequest, or devise for religious, educational, charitable, or benevolent uses from being invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries, and provides that if in the instrument creating the gift, grant, bequest, or devise there is a trustee named to execute the same the legal title to the property shall vest in such trustee, and that if no person be named as trustee, then the title shall vest in the Supreme Court; but nowhere in the statute or in chapter 291 of the Laws of 1901 does it assume to give an unincorporated association power to take or hold such a bequest either absolutely or as a trustee. For this reason it seems clear that the long line of decisions made before the enactment of the statute are still to be given full force. *Fralick v. Lyford*, 107 App. Div. 543; aff'd, 187 N. Y. 524.

In *Matter of Powell* (136 App. Div. 830, 121 N. Y. Supp. 779), there are expressions which would indicate that that court was of the opinion that the trust would be valid, and might vest in the trustees if they were incorporated before judicial settlement.

Trust may be created for the United Society of Shakers.

Section 202 of the Religious Corporations Law makes special provision for trusts created or to be created for the United Society of Shakers or the Religious Society of Friends, and that statute should be consulted when considering any trust made in their interest.

Trusts for masses. See ¶ 272.

Trusts attempted to be created for the purpose of having masses said were formerly held to be invalid as usually drawn and expressed. The reasons given in such cases were that there was no beneficiary living to enforce the trust, or that the trust was void for indefiniteness. The leading cases of that class are *Holland v. Alcock* (108 N. Y. 312); *O'Conner v. Gifford* (117 id. 275).

Where the case has arisen since the enactment of chapter 701, Laws of 1893, now Real Property Law, section 113, and Personal Property Law, section 12, the objection to the indefiniteness of the beneficiary is not tenable. If a gift is made it can be construed to be in trust, provided the duty of procuring the masses to be said is put upon the executor, and in such case the trust may be a valid one. *Matter of Eppig*, 63 Misc. Rep. 613, 118 N. Y. Supp. 683; *Matter of Backes*, 9 Misc. Rep. 504, 30 N. Y. Supp. 394, 61 N. Y. St. Repr. 739.

¶ 329 Suspension of the Power of Alienation.

The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority.

§ 42, Real Property Law.

Section 178 of the Real Property Law provides:

The period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed not from the date of such instrument, but from the time of the creation of the power.

Suspension of ownership; personal property.

The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the determination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property.

§ 11, Personal Property Law.

The power of alienation of real estate and the absolute ownership of personal property is suspended when there are no persons in being by whom an absolute estate in possession can be conveyed or transferred. *Sawyer v. Cubby*, 146 N. Y. 192, 196. And there are but two ways in which this suspension may be accomplished: 1. By the creation of a trust which vests the estate in trustees. 2. By the creation of future estates vesting upon the occurrence of some future and contingent event. *Steinway v. Steinway*, 163 N. Y. 183; *Wilber v. Wilber*, 165 id. 451; *Matter of Roberts*, 112 App. Div. 732, 98 N. Y. Supp. 809.

Where it appears that a conveyance from the life tenants and the remainderman would convey an absolute title there is no invalid trust. *Thieler v. Rayner*, 115 App. Div. 626; aff'd, 190 N. Y. 546; *Wells v. Squires*, 117 App. Div. 502; aff'd, 191 N. Y. 529.

It is not necessary that all of the beneficiaries of the trust or even that any of them should be identical with those whose lives measure the duration of the trust term. These lives may be those of persons who are total strangers to the trust objects. *Bailey v. Bailey*, 97 N. Y. 460; *Crooke v. County of Kings*, 97 id. 421; *Bird v. Pickford*, 141 id. 18; *Schermerhorn v. Cotting*, 131 id. 48; *Kahn v. Tierney*, 135 App. Div. 897, 120 N. Y. Supp. 663; aff'd, 201 N. Y. 516.

Term measured by minority.

It is well settled that a term measured by a minority ends upon the death of the minor. *Roe v. Vingut*, 117 N. Y. 204.

Suspension during a minority is deemed to signify a part of a life and not an absolute term equal to the possible duration of such minority. Real Property Law, § 42.

Undivided fund held in trust during lives of two or more persons.

A will may give the use of the whole estate to one person for life and then the use of the same to two other persons for their respective lives if provision be made for absolute ownership of each share as each of such persons shall die. *Post v. Bruere*, 127 App. Div. 250, 111 N. Y. Supp. 51.

An estate given in trust to pay an annuity from the income with the *corpus* given during the lives of two persons vests upon the death of the survivor of the two persons, subject to the annuity, and is so not subject to the rule against perpetuities. *Peoples' Trust Co. v. Flynn*, 188 N. Y. 385; rev'g, 113 App. Div. 683, 106 id. 78, 44 Misc. Rep. 6.

In cases where a trust for the benefit of several persons is held in one fund it is necessary for the purpose of holding that they constitute separate and independent trusts that each part of the principal fund should be liberated from the trust fund upon the termination of the lives in being at the death of the testator for which the trust is held and also to find from within the will itself that such was the intention of the testator. *Leach v. Godwin*, 198 N. Y. 35; rev'g, *Beatty v. Godwin*, 127 App. Div. 98, 111 N. Y. Supp. 373; *Matter of Bense*, 70 Misc. Rep. 279, 127 N. Y. Supp. 870.

Gift to corporation; income to be used.

A bequest to a corporation to be invested by it and only the income used for the legitimate purposes of the corporation is valid and not against the statute against perpetuities. *Wetmore v. Parker*, 52 N. Y. 450.

Rules to be applied in construing will. See ¶ 69.

In determining whether a will or part of a will is invalid as unduly suspending the power of alienation, the following rules should be considered: First. Such validity must be determined

not in the light of what has actually transpired, but from exactly the same point of view from which it would be regarded had a suit been brought to determine the validity of the will at the time of the death of the testator, instead of at a subsequent period. That is to say, the validity of a will depends not on what has happened since the death of the testator, but on what might have happened. Second. "In determining the validity of limitations of estates, under the above statutes, (the provisions of the Consolidated Laws in reference to absolute ownership and restraint of alienation) it is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency, they will absolutely terminate at such period, or such estates will be held void." *Schettler v. Smith*, 41 N. Y. 328; *Matter of Wilcox*, 194 N. Y. 288.

Suspension of alienation.

A will speaks from the date of death and whether or not it violates the statute against perpetuities must be determined as of that date, and not as of some subsequent date. The validity of such an attempted disposition is to be determined not by the event but by the possibility. *Morton Trust Co. v. Sands*, 122 App. Div. 691, 107 N. Y. Supp. 698.

The disposition is void, although it turns out by subsequent events that no actual suspension beyond the legal period would take place. *Herzog v. Title, G. & T. Co.*, 177 N. Y. 86; rev'g, 85 App. Div. 549; *Schettler v. Smith*, 41 N. Y. 328.

¶ 330 Idem: Effect of Power of Sale. See ¶ 207

A power of sale which does not terminate the trust, but simply works a conversion from real to personal property, does not take a case out of the statute. *Whitefield v. Crissman*, 55 Misc. Rep.

468, 106 N. Y. Supp. 630; aff'd, 123 App. Div. 233, 108 N. Y. Supp. 110.

Restriction on power of sale.

If the execution of even a power of sale is, by any limitation, unduly postponed, such limitation violates the rule against a perpetuity, and is void, unless the power is of such a nature as to be presently extinguished or merged. Where the power may be released by a person entirely *sui juris*, it would seem to create a perpetuity. If the power of alienation was suspended for a term not measured by lives, then the provision is void. *Brown v. Quintard*, 177 N. Y. 75, 82; *McGuire v. McGuire*, 80 App. Div. 63, 80 N. Y. Supp. 497. It is bad if, at the time of the creation of the trust, there was a possibility that there could be no sale for the period of five years. Nelson, Ch. J., in *Hawley v. James*, (16 Wend. 61, 120), says: "Now if in either aspect the limitation of the estate might suspend the power of alienation beyond the time allowed by the law, it will be impossible to sustain it, because the rule is well established that a limitation which, *by possibility*, may create such a suspension, is void." See, too, *Amory v. Lord*, 9 N. Y. 403, 415, citing *Hawley v. James*, *supra*; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 99; *Trowbridge v. Metcalf*, 5 App. Div. 318; aff'd, 158 N. Y. 682; *Stewart v. Woolley*, 121 App. Div. 531, 106 N. Y. Supp. 99.

The power of alienation is not suspended where the testator gives directions as to when a power of sale shall be exercised for the purpose of facilitating a sale and not to limit or restrict it. *Deegan v. Wade*, 144 N. Y. 573; *Graham v. Ackerly*, 120 App. Div. 430, 105 N. Y. Supp. 51.

The following language of a will has been held not to suspend alienation unduly: "I order and direct my said executors, or the survivor of them or the one who shall act as his or their legal successors in office, to sell and convey my said farm and real property for the best price they can obtain therefor, within

three years from and after the April first following my decease.” *Dillenbeck v. Dillenbeck*, 134 App. Div. 720, 119 N. Y. Supp. 124.

In *Tonnelle v. Wetmore*, 124 App. Div. 686, 700, it was said: “The provision which says that his executors shall have power to retain his property until the year 1868 is coupled with a power ‘to sell and convey all or any part of my real estate * * * as may seem to them most for the interest and advantage of my children,’ and does not prevent the alienation of the estate for a moment.

“In addition it should be noticed that this power never became effective for any purpose. I am well aware of the rule that in considering the validity of a disposition of real property under which an attempt is made to restrain alienation, the effect is to be considered as if the alienation was restrained for the longest period contemplated. But here as the estate did not vest in the trustees until after this period there was not and never could be any restraint upon their power of alienation and, therefore, the clause as it stands, even though it was mandatory, could have no effect upon the right to sell or convey the property.”

“Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed, by the nonaction of the trustee, or, in consequence of a discretion reposed in him, by the creator of the trust. The Statute of Perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being, who can, at any time, convey an absolute fee in possession. The only question which, in such a case, can arise under the Statute of Perpetuities, is

whether the trusts in respect to the converted fund are legal or operate to suspend the absolute ownership of the fund, beyond the period allowed by law." *Keyser v. Mead*, 53 Misc. Rep. 114, 103 N. Y. Supp. 1091.

Gift over after expiration of invalid trust.

A vested gift, otherwise valid, will not fail merely because it is limited to take effect at the expiration of a trust which is void under the statute. *Matter of Berry*, 154 App. Div. 509, 139 N. Y. Supp. 186; aff'd, 209 N. Y. 540.

¶ 331 Trusts Until Youngest Child Arrives at a Specified Age, or Apparently for Term of Years.

Alienation may be suspended until "my youngest child arrives at the age of 21 years," since it will be construed that the testator meant the youngest of his children surviving him, and that he intended to measure the duration of the trust by the life of that particular child.

"The mere fact that during the flux of this minority several of the testator's children could die by no means indicates that the power of alienation was necessarily suspended during the lives of any one of them or for any other period than the single life which was selected as the standard." *Matter of Mikantowicz*, 60 Misc. Rep. 273, 113 N. Y. Supp. 278.

It is often urged in opposition to the will that the absolute power of alienation is unlawfully suspended, in that the trust estate is not made dependent upon a life or lives in being, but upon a term of years, viz., so many as would be comprised between the age of the testator's youngest child, being a minor at the time of his death, and the attainment of majority by that minor child. But the rule in cases of the construction of trust terms of this character is that unless a contrary intention is clearly made to appear from the will, the court will, in support of an otherwise valid trust, imply an alternative, and make the trust terminable at the attainment of majority of the minor upon whose life the suspension is limited, or the earlier death of that minor.

As was said by Duer, J., in *Lang v. Ropke* (5 Sandf. 363, 369): "A devise to trustees to receive and apply rents and profits during a minority is not an absolute term of years corresponding with the possible duration of the minority, but is determined by the death of the minor before he attains age." This construction of the limitation was adopted both by the chancellor and the Court of Errors in *Hawley v. James* (5 Paige, 463, 16 Wend. 61), and "must now be considered as the settled law of the State." Where the testator has plainly provided that the whole estate shall be divided among the remaindermen when his youngest child reaches majority, the rule referred to applies.

"All trusts end when the purpose for which they have been created has been performed, and the testatrix having provided a trust fund to pay over the income to her children until the youngest of them shall be twenty-five years of age, the trust terminates upon the arrival of that time, because there is no further purpose of the trust to be accomplished."

"But it is urged that if the above proposition is overruled the trust is for a term fixed by years, and is, therefore, void. The trust is for the benefit of a class measured by the life, or a less time, of the testatrix's youngest child. It terminates absolutely upon the youngest child reaching the age of twenty-five years, and if he dies before that time the trust term is ended by his death." *Sawyer v. Cubby*, 146 N. Y. 192, 197; rev'g, 73 Hun, 298; *Burke v. O'Brien*, 115 App. Div. 574, 100 N. Y. Supp. 1048; *Coston v. Coston*, 118 App. Div. 1, 103 N. Y. Supp. 307.

Where an attempt was made to create a trust until the youngest child should attain a certain age, the trust was held to be invalid because it was one trust indivisible and, therefore, was dependent upon the lives of all the children (three) and would not terminate upon the death of the youngest child. *Central Trust Co. v. Eggleston*, 185 N. Y. 23; rev'g, 110 App. Div. 893, 47 Misc. Rep. 475.

For a term of years.

A trust may be valid for a term of years where the title vests in the beneficiary, and it terminates upon the prior death of the beneficiary. *Matter of Lincoln Trust Co.*, 76 Misc. Rep. 421.

Trust inoperative by beneficiary attaining majority.

Where a trust is plainly created because of the minority of the beneficiary, and such beneficiary attains his majority before the death of testator, the trust becomes inoperative, and the fund passes in accordance with the residuary or other provision of the will, unless such other disposition of the fund is so related to the trust that its failure necessarily involves the other. *Matter of Arensburg*, 120 App. Div. 463, 104 N. Y. Supp. 1033.

No estate vests in the trustee, but the title passes at once to the beneficiary subject to the execution of the power of sale for the purpose of division. *Matter of Murray*, 124 App. Div. 548, 108 N. Y. Supp. 1047; *Matter of Pilsbury*, 50 Misc. Rep. 367.

Letting in after-born children.

Where a gift is made to children to take effect upon the termination of a particular estate, or upon the death of a person, such gift embraces not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution, and, therefore, the same may be invalid. *Kilpatrick v. Johnson*, 15 N. Y. 322.

¶ 332 Termination or Destruction of the Trust; Transfer of Rights Thereunder.**Trust cannot be terminated by act of parties.**

No act of the *cestui que trust*, the trustee, or the Legislature, or all three combined, can terminate a legal trust created for a legal period until the expiration of the time set by the testator. *Metcalfe v. Union T. Co.*, 181 N. Y. 39; aff'g, 87 App. Div. 144; *Matter of Kirby*, 113 App. Div. 705, 100 N. Y. Supp. 155.

Terminating trust by act of parties; personal estate.

The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person,

cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred.

From § 15, Personal Property Law.

Terminating trust of real property.

The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person cannot be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred.

From § 103, Real Property Law.

An agreement to make over part of the income from personal property held in trust is prohibited by section 15 of the Personal Property Law. *Slater v. Slater*, 114 App. Div. 160, 99 N. Y. Supp. 564; aff'd, 188 N. Y. 633.

A transfer of income to which a beneficiary is entitled under a trust is void. *Matter of Foster*, 30 Misc. Rep. 573, 63 N. Y. Supp. 1102; *Tolles v. Wood*, 99 N. Y. 616; *Cass v. Cass*, 15 App. Div. 235, 44 N. Y. Supp. 186.

Over fifty years ago it was held that a trust to pay over income to a beneficiary was a trust to apply the income to the use of such person within the meaning of the statute (*Leggett v. Perkins*, 2 N. Y. 297); and as late as the case of *Cochrane v. Schell* (140 N. Y. 516), it was held that a trust to pay over a specific sum yearly fell within the statute and was not assignable by the beneficiary. *Matter of Ungrich*, 201 N. Y. 415.

The trustee is charged with the duty of seeing that the income is not diverted. *Stringer v. Young*, 191 N. Y. 157.

An agreement to make over part of the income of real or personal estate held in trust is prohibited by this section. *Slater v. Slater*, 114 App. Div. 160; aff'd, 188 N. Y. 633.

The prohibition against the assignment by a beneficiary of the right to enforce the performance of a trust of personal property is limited to cases where the trust is one to receive the income and apply it to the use of any person. The statute expressly provides that "the right and interest of the beneficiary of any other trust in personal property may be transferred." *Kane v. Gott*, 7 Paige, 521, 24 Wend. 641; *Coster v. Lorrillard*,

14 Wend. 265; *Wells v. Squires*, 117 App. Div. 502; aff'd, 191 N. Y. 529.

Trust for life of husband or wife; effect of divorce.

Trust during life of husband and upon his death, trust to end — *held*, that divorcing the husband and his remarriage did not terminate the trust. *Pelton v. Macy*, 124 App. Div. 367, 108 N. Y. Supp. 713.

Expectant estates are alienable.

By the provisions of the Real Property Law (§ 59), all expectant estates are now descendible, devisable, and alienable in the same manner as estates in possession. But this does not prevent a testator from making an expectant estate subject to be defeated by the exercise of a power of sale. *Bascom v. Weed*, 53 Misc. Rep. 499, 105 N. Y. Supp. 459.

There is no prohibition upon the remainderman transferring his interest in the fund or property so held in trust at any time. *Bergman v. Lord*, 194 N. Y. 70.

Ever since the Revised Statutes, at least, all expectant estates have been alienable, whether vested or contingent. Real Prop. Law, § 59; Pers. Prop. Law, § 11; *Moore v. Littell*, 41 N. Y. 66, 83, 86; *Dodge v. Stevens*, 105 id. 585, 588; *Griffin v. Shepard*, 124 id. 70; *Roosa v. Harrington*, 171 id. 341, 353. The real question is whether the party has any present interest at all, whether vested or contingent. Upon this question we have the highest authority for saying that the cases are not at all in harmony. *Connelly v. O'Brien*, 166 N. Y. 406, 409. *Matter of Crane*, 164 N. Y. 71; *Dougherty v. Thompson*, 167 id. 472; *Matter of Keogh*, 47 Misc. Rep. 37, 112 App. Div. 414, 186 N. Y. 544; *Matter of Hoadley*, 101 Fed. Rep. 233, and cases cited; *Matter of Gardner*, 106 id. 670; *Lauter v. Hirsch*, 67 Misc. Rep. 165, 121 N. Y. Supp. 651.

A remainder in a trust fund may be sold under execution against the beneficiary. *Cohalan v. Parker*, 138 App. Div. 849, 123 N. Y. Supp. 343.

Right to cause a merger of a trust existed from 1893 to 1903.

When a trust was created, before 1893, section 63 of the Statute of Uses and Trusts was in force, applicable alike to real and personal property; which prevented the beneficiary of such a trust from assigning, or disposing of, his interest. Subsequently, in 1893 (Laws of 1893, chap. 452), that section of the Revised Statutes was amended, so as to permit a "person beneficially interested in the whole or any part of the income of any trust heretofore or hereafter created for the receipt of the rents and profits of lands or the income of personal property," who "shall have heretofore become or may hereafter be or become entitled" to the remainder in a trust fund, to release to himself all his interest in the income of the trust estate and, thereafter, the estate of the trustee was to cease and determine. In 1897 (chap. 417, Laws of 1897), the Personal Property Law was enacted; section 3 of which repealed previous statutes upon the subject and read that "The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust in personal property may be transferred. Whenever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."

The Legislature, by chapter 88 of the Laws of 1903, now section 103, Real Property Law, has restored the state of the law to its earlier condition under the Revised Statutes; whereby the interest of a beneficiary in such a trust is rendered inalienable. *Metcalf v. Union Trust Co.*, 181 N. Y. 39.

The surrogate may give their legal effect to the unattacked conveyances which operate as a merger.

The surrogate may determine whether a trust estate has been merged under the statute. *Matter of U. S. Trust Co.*, 175 N. Y. 304.

Trust created before passage of the act of 1893 and amendments cannot be terminated where the trustee would be deprived of his commissions. Following *Oviatt v. Hopkins*, 20 App. Div. 168, 46 N. Y. Supp. 959; *Newcomb v. Newcomb*, 33 Misc. Rep. 191, 68 N. Y. Supp. 430.

This statute is not retroactive and such merger cannot take place where will became effective in 1892. *Metcalf v. Union T. Co.*, 181 N. Y. 39; aff'g, 87 App. Div. 144.

Death in 1901. Testator gave two sisters life estates with power of appointment in the survivor — *held* that during their joint lives they could not so convey as to cause a merger of the trust. *Garrett v. Duclos*, 128 App. Div. 508, 112 N. Y. Supp. 811.

May merge by operation of law.

Where by death the life estate and remainder are united in the same person a merger takes place and the fund may be directed to be paid over. *Matter of Wadsworth*, 58 Misc. Rep. 489, 111 N. Y. Supp. 630.

¶ 333 Trust May Cease upon Request of Beneficiary, in Discretion of Trustee, or by Operation of Law.

A trust which provides for payment of the trust fund to the beneficiary upon his application may be valid as between the parties, but as to creditors, however, the trust cannot stand, for it is opposed to public policy as declared by statute and by the decisions of the courts. *Hallett v. Thompson*, 5 Paige, 583; *Frazer v. Western*, 1 Barb. Ch. 220.

In *Hallett v. Thompson*, Chancellor Walworth declared that it was "contrary to sound public policy to permit a person to have

the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors." That case was cited and the language of the chancellor substantially quoted with approval by Judge Rapallo in *Williams v. Thorn* (70 N. Y. 270, 273), and it has received the approval of many courts in this State and elsewhere. *Ullman v. Cameron*, 186 N. Y. 339; aff'g, 105 App. Div. 159.

Payable when certain conditions are met.

In *Cushman v. Cushman* (116 App. Div. 763; aff'd, 191 N. Y. 505), there was a provision of the will that the principal might be paid over when a son arrived at twenty-five years of age, if in the opinion of the trustee the son were of good moral habits and competent to take charge of and prudently manage the property.

In *Matter of Farmers' Loan and Trust Co.* (Palmer) (65 Misc. Rep. 418, 121 N. Y. Supp. 1099), the payment over might be made when the beneficiary became solvent, and it was held that a discharge in bankruptcy made him "solvent" within the language of that will.

To cease upon recovery or payment of judgment.

A bequest to trustee to pay income to son for life may be limited upon the recovery of a judgment against the son, and such trust may then be made to terminate. *Bramhall v. Ferris*, 14 N. Y. 41.

Trust to end when the son had no judgments against him unsatisfied of record and was worth \$100 — held that a discharge in bankruptcy was a sufficient discharge. *Young v. Young*, 127 App. Div. 130, 111 N. Y. Supp. 341.

Trust dependent upon abstinence.

A trust to terminate upon the beneficiary abstaining from drink for a term of years may be valid if it is to terminate also upon his death prior to the expiration of the term of years. *Keenan v. Keenan*, 122 App. Div. 435, 107 N. Y. Supp. 152.

Death of beneficiary before arriving at specified age.

Where the beneficiary had met the terms of the trust but died before arriving at the age for payment, the trustees not having exercised a right of revocation given by the will, it was held that the legacy vested in the beneficiary and passed to his representatives. *Matter of Schmitt*, 137 App. Div. 286, 121 N. Y. Supp. 982.

Trust terminated in accordance with direction in the will. See ¶ 279.

Where a will gives the life beneficiary of a trust power to direct payment of any part of the remainder to another person, such power of appointment may terminate the trust. *Frankel v. Farmers' L. & T. Co.*, 152 App. Div. 58, 136 N. Y. Supp. 703.

Abrogation of trust by election of widow to take dower. See ¶ 311.

Where a trust is created, for the benefit of the widow and others, her share to be in lieu of dower, it is held that her election not to take under the will does not defeat the operation of the trust for the benefit of other parties in interest. Page Wills, 874; *Portuondo Estate*, 185 Penn. St. 472.

Where the widow by her election causes a diminution of the estate devised to others, determinable under the will, then, whatever she renounces by her election of necessity results to the indemnity and inures to the benefit of those who are injured by her acts. *Kirchner v. Kirchner*, 71 Misc. Rep. 57, 127 N. Y. Supp. 399.

In the case of *Matter of Lawrence* (36 Misc. Rep. 276, 73 N. Y. Supp. 414), it was held that where a widow's election to take dower, rather than the provisions of the will, makes it necessary to appropriate to the satisfaction of her dower proceeds of the sale of real estate given by the testator to others, the parties benefited should contribute in proportion to their benefits to make up the losses of those who have been disappointed by the widow's election.

Termination of trust by death of beneficiary; trust relation continues for purposes of accounting. See ¶ 80.

Upon the death of the beneficiary, although the trust terminates the legal relation of the trustee to the fund does not end until he has had his accounting and is authorized to pay over the balance of the fund. Therefore, he is not liable to the remainderman in an action of conversion for not paying the fund over on demand. *Deering v. Pierce*, 149 Misc. Rep. 10, 133 N. Y. Supp. 582; *Husted v. Thomson*, 7 App. Div. 66; aff'd, 158 N. Y. 328.

CHAPTER XLVII

Trusts and Trustees Continued; Duties of Trustees in Making Investments; Dealing with Trust Property, and Applying Income Thereof.

- ¶ 334. Duty of trustees in dealing with trust property.
- ¶ 335. § 2696. Purchase, sale, lease or exchange of trust lands.
- ¶ 336. § 21 (P. P.). Investment of trust funds.
- ¶ 337. Diligence and prudence in making investments.
- ¶ 338. General rights and duties.
- ¶ 339. Reaching income to satisfy debts.
- ¶ 340. Reaching surplus income.
- ¶ 341. Retaining income to pay costs against beneficiary.
- ¶ 342. Premiums paid in purchase of securities.
- ¶ 343. Increase on sale.
- ¶ 344. Allotment of stocks or bonds, and apportioning dividends.
- ¶ 345. § 2689. Proceeding to compel payment or delivery of legacy.
- § 2690. Proceedings and decree.

¶ 334 Duty of Trustees in Dealing with Trust Property.

“The duties of a trustee to his beneficiary require not only the highest good faith in their execution, but also the absence of conflicting personal interests, and often the sacrifice of personal convenience and chance of profit.” Trustees are held to great strictness in their dealings with the estate. Chancellor Kent enunciated the rule in the following terms: “It may be here observed, as a general rule applicable to sales, that when a trustee of any description, or a person acting as an agent for others, sells a trust estate, and becomes himself interested, either directly or indirectly in the purchase, the *cestui que trust* is entitled, as of course, in his election to acquiesce in the sale.

* * * A person cannot act as agent for another and become himself the buyer. He cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary re-

lation. The rule is founded on the danger of imposition, and the presumption of the existence of fraud, inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, 'and which, in the cases in which such relationship exists, is deemed to be of itself sufficient to create the disqualification.' "

This doctrine has been followed by every text-book writer and the unanimity of decisions only emphasizes the rule.

"Trustees hold a position of trust and confidence. The legal title of the trust property is in them and generally the whole management and control is in their hands. At the same time the beneficiaries of the trust may be women, or children, or persons incompetent to protect their own interests. For these reasons, to protect the weak and helpless on the one hand, and to prevent trustees from using their position and influence for their own gain, and to prevent them from hazarding the trust property upon what they may think to be profitable speculations, on the other hand, they are not allowed to make any profit from their office. They cannot use the trust property, nor their relation to it for their personal advantage. All the power and influence which the possession of the trust fund gives must be used for the benefit and advantage of the beneficial owners. No other rule would be safe; nor would it be possible for courts to apply any other rule as between trustee and *cestui que trust*. * * * Trustees cannot make a profit from the trust funds committed to them, by using the money in any kind of trade or speculation, nor in their own business; nor can they put the funds into the trade or business of another, under a stipulation that they shall receive a bonus or other profit or advantage."

It is a well-established principle of equity that all profits arising from sales inure to the benefit of the *cestui que trust*. *Fulton v. Whitney*, 66 N. Y. 548; *Matter of Sandroek*, 49 Misc. Rep. 371, 99 N. Y. Supp. 497.

A trustee cannot deal to his own advantage with matters connected with his trust estate; and any contract he may make to

that end is invalid, although no fraud be perpetrated or duress practiced. *Carpenter v. Taylor*, 164 N. Y. 171; *Fulton v. Whitney*, 66 id. 548; *Matter of Schroeder*, No. 1, 113 App. Div. 204, 99 N. Y. Supp. 176; *Slater v. Slater*, 114 App. Div. 160; aff'd, 188 N. Y. 633.

Allowing life tenant to collect rents; accounting.

Where the trustee has permitted the life tenant to collect the rents and pay the running expenses of the property, he is entitled to an accounting of all such transactions, as such accounting might involve equitable consideration it may be had in Supreme Court. *Mildeberger v. Franklin*, 70 Misc. Rep. 334, 126 N. Y. Supp. 803.

¶ 335 Purchase, Sale, Lease or Exchange of Trust Lands.

Purchase of trust property.

Where a trustee had purchased the trust property on foreclosure and had held it for more than twenty years and no person interested had ever complained of the transaction—*held* good title. *Kahn v. Chapin*, 152 N. Y. 305; aff'g, 84 Hun, 541.

The purchase by a trustee of trust property is not void *ab origine*, but voidable only, and then only at the instance of the beneficiary or person deriving title from him. Lapse of time will confirm the title. *Harrington v. Erie Co. S. B.*, 101 N. Y. 257.

Trustee has a right to purchase from beneficiary trust property or obtain a release, if free from fraud or undue advantage. *Geyer v. Snyder*, 140 N. Y. 394; aff'g, 69 Hun, 115.

A trustee may purchase part of the trust estate from the beneficiary if he is competent to contract and the transaction is free from fraud. *Graves v. Waterman*, 63 N. Y. 657.

Trustees should not be purchasers at a sale of property concerning which as trustees, they have any interest or duty. *Fulton v. Whitney*, 66 N. Y. 548.

Fraud in buying trust property; limitations.

Where a fair price was paid by the trustee the fraud is constructive only, and the ten-year statute of limitations applies. *Chorrmann v. Bachmann*, 119 App. Div. 146, 104 N. Y. Supp. 151.

When trustee may convey or exchange trust property.

1. If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust, except as provided in this section, shall be absolutely void. The supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such trustee to mortgage or sell such real property or any part thereof whenever it appears to the satisfaction of the court that said real property, or some portion thereof, has become so unproductive that it is for the best interest of such estate or that it is necessary or for the benefit of the estate to raise funds for the purpose of preserving it by paying off incumbrances or of improving it by erecting buildings or making other improvements, or that for other peculiar reasons, or on account of other peculiar circumstances, it is for the best interest of said estate, and whenever the interest of the trust estate in any real property is an undivided part or share thereof, the same may be sold if it shall appear to the court to be for the best interest of such estate.

2. Whenever, by the provisions of a will, or of a deed of trust, a power of sale is given to one or more executors or trustees, it shall be lawful for any such executor or trustee, subject to the approval of the supreme court, to acquire or exchange lands adjacent to the land or lands subject to such power of sale, as may be deemed desirable for the straightening or improvement of the boundary lines thereof, upon such terms and conditions as may be approved by the supreme court; and the supreme court may, by order, on such terms and conditions as seem just and proper, authorize any such executor or trustee to acquire or exchange lands adjacent to the land or lands subject to such power of sale for the purposes mentioned.

§ 105, Real Property Law.**When trustee may lease trust property.**

A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The supreme court may, by order, on such terms and conditions as seem just and proper, in respect to rental and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate, and may authorize such trustee to covenant in the lease to pay at the end of the

term, or renewed term, to the lessee the then fair and reasonable value of any building which may have been erected on the premises during such term. If any such trustee has leased any such trust property before June fourth, eighteen hundred and ninety-five, for a longer term than five years, the supreme court, on the application of such trustee, may, by order, confirm such lease, and such order, on the entry thereof, shall be binding on all persons interested in the trust estate.

§ 106, Real Property Law.

The detail of the proceedings to obtain conveyance or lease of trust property is given in section 107 of the Real Property Law.

These sections do not authorize a proceeding for the exchange or partition of trust property. *Von Glahn v. Heins*, 128 App. Div. 167.

Before the amendment of 1897 the act permitted a sale of a trust estate—"whenever it shall appear * * * that it is for the best interest of said estate so to do, and that it is necessary and for the benefit of the estate, to raise by mortgage thereon, or by a sale thereof, funds for the purpose of preserving or improving such estate."

Under this act it was held that the necessity for a sale or mortgage was of predominant importance, and that, to justify an order authorizing a sale, it must be made to appear that "a necessity exists for the use of money in the preservation or improvement of the property." *Matter of Roe*, 53 Hun, 433, 6 N. Y. Supp. 464; aff'd, 119 N. Y. 509, 23 N. E. 1063.

Throughout the section as it now stands the disjunctive is used in place of the conjunctive. The actual necessity for a sale no longer controls, but a sale of the trust property may be had under authority of the court because it has become unproductive, or because it is necessary or for the benefit of the estate. The amendment of 1897 was clearly an enabling act intended to permit the sale or mortgage of the estate of the remaindermen which could not be done under the former act (*Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8), and extend the cases in which the court might authorize the sale or mortgage of trust property. *Weir*

v. *Barker*, 104 App. Div. 112, 93 N. Y. Supp. 732. It is manifest that the amendment of 1897 was intended to widen, and has greatly widened, the scope of the section, and has authorized the court to act under circumstances which theretofore would not have justified action. Among the grounds upon which a sale may be authorized under the present act, and not found in the section before amendment, is "that said real property, or some portion thereof has become so unproductive that it is for the best interest of the estate" that said real property be sold. This, under the wording of the statute, is sufficient irrespective of any question of necessity. *Webster Realty Co. v. Delano*, 135 App. Div. 488, 120 Supp. 440.

Sale of interest in remainder.

Where the estate of the trustee is for the life of a beneficiary only, no sale of the interest of the remaindermen can be had. *Losey v. Stanley*, 147 N. Y. 560.

See *Matter of Easterly*, 202 N. Y. 466; rev'g, S. C. *Matter of Lamoree*, 140 App. Div. 650.

Mortgaging trust property.

In *Matter of Windsor Trust Co.*, 142 App. Div. 772, 127 N. Y. Supp. 586, the court permitted the mortgaging of the trust property to raise money to comply with the Tenement House Act and to make necessary improvements.

Power to sell, mortgage or lease real estate may be executed by qualifying trustees or successors.

Where any power to sell, mortgage or lease real estate or any interest therein, are given to trustees, and any of such persons named as trustees shall neglect to qualify, then all sales, mortgages and leases under said power made by the trustee or trustees who shall qualify shall be equally valid as if the other trustees had joined in such sale. Where a successor trustee has been appointed by the court, or is named in a will, he shall have the same power as to such real estate as the trustee or trustees had who were named in the will, unless the exercise of such power would be contrary to the express provision of the will.

§ 2696, Code Civ. Pro.

¶ 336 Duty of Trustees as to Investment of Funds.

The enumeration of certain investments which trustees are authorized to make may be found in section 239 of the Banking Law. It will be necessary to consult the statute each year as the Legislature makes frequent additions thereto.

Direction in will as to investments.

The creator of a trust requiring the investment of money may direct how the investment shall be made and what securities shall be taken, and may even dispense with the taking of any security, *Denike v. Harris*, 84 N. Y. 89; *Matter of Stewart*, 30 App. Div. 368; aff'd, 163 N. Y. 593; *Matter of Irwin*, 59 Misc. Rep. 143, 112 N. Y. Supp. 205.

Sanction or ratification of beneficiary.

While it is true as a bald proposition that a trustee cannot deal to his personal advantage with the property of his trust, it is likewise true that a *cestui que trust* cannot allege an act upon the part of his trustee to be a breach of trust which has been done under his sanction or procurement or concurrence. *Butterfield v. Cowing*, 112 N. Y. 486; *Vohmann v. Michel*, 185 id. 420.

In certain cases a ratification need not be proved. *Ungrich v. Ungrich*, 131 App. Div. 24, 115 N. Y. Supp. 413.

Deposit in bank not an investment.

Where a trustee is directed by the will to invest money and pay the income thereof to a beneficiary, the intention of the testator is not only to preserve the fund but to cause the fund to produce an income for the benefit of the person who is thus made the object of his bounty.

The person who assumes the duty of acting as trustee undertakes not only to keep the fund safely but to make it produce the best income consistent with its safe investment. The trustee who allows the fund to remain on deposit in the bank or who puts it into a bank does not thereby invest the fund, for a deposit in bank is not an investment thereof.

The beneficiary is entitled to the active diligence of the trustee in seeking and making investments which will bear the highest rate of income consistent with safety.

Where a trustee was directed to invest funds and instead thereof allowed the funds to remain on deposit in a bank which failed he was charged with such loss, the court saying: "It, the deposit, seems to have been left there by the trustee as an investment of the fund which he supposed himself to be authorized to make, but the law does not permit a trustee to deal with moneys in his hands in that capacity in this manner. He is on the contrary required to invest it in public stocks or securities by way of bond and mortgage which will thereby insure the preservation of the fund for the parties entitled to its income and finally to the payment of the principal." *Matter of Knight*, 21 Abb. N. C. 388.

In exercising their powers of investment the trustees are bound to see to it that the securities are first class and that they are safe. After that has been done the further duty arises to make due discrimination between the securities falling within the description with the view of selecting such as bear the highest rate of interest. *Clark v. Clark*, 23 Misc. Rep. 272, 50 N. Y. Supp. 1041.

Legal investments for trust funds.

A trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon. A trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself.

For a statement of such securities referred to in this section see section 239 of the Banking Law. A similar provision regarding investments by executors and administrators is found in section 111 of the Decedent Estate Law, and the same section is made to apply to guardians by section 85 of the Domestic Relations Law.

Investment of trust funds in participating mortgages. See ¶ 338.

Many corporate trustees, having numerous trust funds to keep invested, take to themselves large mortgages, and by a system of bookkeeping show that a certain amount of a particular trust fund has been invested in such mortgage, and that such fund is therefore entitled to participate in the income and principal of such mortgage, the extent of its interest therein being shown by the books of the trustee. Such action is justified by the corporate trustee on account of the advantage to the beneficiary of having a ready investment for any amount, which could not be readily found in separate investments. This practice has been recently condemned in strong terms and with perfect reasoning by Surrogate Ketcham, of Brooklyn, in an elaborate opinion written in the *Matter of Hoffman* and published in the *New York Law Journal* of July 7, 1914.

¶ 337 Diligence and Prudence in Making Investments.

The executors in making investments are called upon to exercise that degree of diligence and prudence as in general prudent men of discretion and intelligence in such matters employ in their own like affairs. *King v. Talbot*, 40 N. Y. 76; *Ormiston v. Olcott*, 84 id. 339; *Matter of Denton v. Sanford*, 103 id. 607.

In the case of *King v. Talbot* (*supra*), Woodruff, J., says: "The real inquiry, therefore, is, * * * Has the administration of the trust * * * been governed by fidelity, diligence, and prudence? If it has, the defendants are not liable for losses which nevertheless have happened." The court then defines fidelity and diligence as follows: "Fidelity imports sincere and

single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty, which the trust imposes. And this is but a paraphrase of 'good faith.'

"The meaning and measure of the required prudence and diligence * * * is, that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs.

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made.

"It, therefore, does not follow, that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded."

In the case just referred to the court held that the defendants were not at liberty to invest the trust fund in stock of the Delaware & Hudson Canal Company, of the New York & Harlem Railroad Company, of the New York & New Haven Railroad Company, of the Bank of Commerce, or of the Saratoga & Washington Railroad Company. *Matter of Burr*, 48 Misc. Rep. 56, 96 N. Y. Supp. 225.

Investments by trustees outside of this state.

While we are not disposed to say that an investment by a trustee in another State can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance, and of foreign tribunals, will not be up-

held as a general rule, and never unless in the presence of a clear and strong necessity or a very pressing emergency. The cases in our courts have quite clearly recognized the rule that an executor must invest in government or real estate securities. *Ackerman v. Emott*, 4 Barb. 626. It would often be unjust to beneficiaries to compel them to accept such investment and tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents, and legal remedies would have to be sought under the disadvantages of distance, and before different and unfamiliar tribunals. We do not hesitate, therefore, to recognize and declare as the general rule that the trustee who invests beyond the jurisdiction does so at the peril of being held responsible for the safety of the investment. But this rule relates only to voluntary investment by the trustee, having the fund in his hands and full opportunity and freedom of choice, and does not govern a case where, by the act of the testator, a foreign investment has been made; nor a case where, without fault of the executor, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. The question at bottom is in every instance the prudence and diligence of the executor, and that always must be measured, and may be modified by surrounding circumstances. *Ormiston v. Olcott*, 84 N. Y. 339; *King v. Talbot*, 40 id. 76; *Matter of Wotton*, 59 App. Div. 584, 69 N. Y. Supp. 753.

Power to "direct and control the conduct" of executors gives the surrogate jurisdiction to approve or disapprove of investments. Example of unsafe investments. *Jones v. Hooper*, 2 Dem. 14.

Retaining or selling investments made by the testator.

Generally speaking, trustees are not justified, in the absence of some authority, in the instrument creating the trust, to the contrary, in continuing an investment formerly made by the testator

which they would not be justified themselves in making. It is their duty to convert such stocks into money within a reasonable time after the creation of the trust. *Adams v. Van Vleck*, 4 Dem. 343; *Matter of Wotton*, 59 App. Div. 584; *King v. Talbot*, 40 N. Y. 76; *Warren v. Union Bank of Rochester*, 157 id. 259; rev'g, 28 App. Div. 7.

Power of trustee to sell securities left by testator.

The general rule is "That trustees may not sell or vary specific securities given in trust, nor securities left by a testator in which he has himself invested the funds," but such rule does not prevent trustees from converting wasting securities into those of a permanent character and converting investments that are not authorized by law into such as are allowed by law. Trustees are not justified, in the absence of express or implied directions in the will, in continuing an investment permanently made by the testator which they would not be justified themselves in making. *Toronto Gen. T. Co. v. C., B. & Q. R. R. Co.*, 64 Hun, 1; aff'd, 138 N. Y. 657.

Where trustees are authorized by a will to invest in general securities, they must still exercise sound judgment and discretion in selecting such investments and not enter speculative enterprises. *Matter of Hall*, 164 N. Y. 196; mod'g, 48 App. Div. 488, 62 N. Y. Supp. 888.

Property taken under mortgage.

Where trustees invest in mortgages, foreclose, and bid in the property, and afterward sell at a profit, there must be an apportionment between the persons entitled to the income and the principal. *Matter of Marshall*, 43 Misc. Rep. 238, 88 N. Y. Supp. 550.

Investments in unproductive real estate made by deceased.

When sold at a profit the whole proceeds become corpus, although carrying charges have been taken from income. *Patterson v. Vivian*, 63 Misc. Rep. 389.

¶ 338 Some General Rights and Duties of Trustees.

A mother who is executor of her husband's estate and trustee for her infant son has no right to use the trust fund to pay for board of such son. *Terry v. Bale*, 1 Dem. 452.

A trustee cannot exact a release or even a receipt as a condition of paying money due. *Schlumbach v. McLean*, 83 App. Div. 157, 82 N. Y. Supp. 516; aff'd, 178 N. Y. 600.

Joining with life tenant for insurance and lightning-rods for protection of trust estate approved. *Peck v. Sherwood*, 56 N. Y. 615.

Foreign trustees.

Gift of personal property to trustees residing in a foreign country for a purpose valid there will be upheld here. *Hope v. Brewer*, 136 N. Y. 126.

The policy of the law favors upholding charitable bequests, whether they are to be administered at home or abroad, and if to be administered abroad, the right of the foreign legatee to take will be determined by our courts before directing the executors to turn over the fund, but under the law of the foreign jurisdiction and unaffected by our laws relating to accumulations and perpetuities. *St. John v. Andrews' Inst.*, 117 App. Div. 698, 102 N. Y. Supp. 808.

A foreign trustee may maintain an action without having the will probated here. *Toronto G. T. Co. v. Chicago, B. & Q.*, 123 N. Y. 37.

Whether a trust created by a will as to realty situated in another State is valid or not can only be determined by the courts of that State. *Knox v. Jones*, 47 N. Y. 389.

Repairs. See ¶ 410.

Where a trustee is authorized to repair and has not the funds, he may make the estate and not himself individually liable to the creditor by an express agreement to that effect. *Mulrein v. Smilie*, 25 App. Div. 135, 48 N. Y. Supp. 994.

Effect of setting apart funds.

Where an accounting has been had and a trust fund set apart and the balance of the estate paid to the residuary legatees, the loss of such trust fund by the trustees does not make the residuary legatees liable to contribute to such loss. *Mills v. Smith*, 141 N. Y. 256.

Where a certain sum is bequeathed in trust to pay the interest at fixed periods, the executor cannot without the consent of the beneficiaries set apart bank stocks to the satisfaction of the trust so as to release the residue of the estate from its liability to perform the trust. *Leitch v. Wells*, 48 N. Y. 585.

Several distinct trusts may hold property in common. See ¶ 336.

There is no reason why several distinct trusts may not hold property in common. For convenience of investment and to avoid loss by a forced sale, the funds may remain *in solido* while the interests therein are several. We find in the books numerous instances where separate and distinct trusts have held property in this manner. *Manice v. Manice*, 43 N. Y. 303; *Savage v. Burnham*, 17 id. 561; *Stevenson v. Lesley*, 70 id. 512; *Matter of Verplanck*, 91 id. 439, 443; *Vanderpoel v. Loew*, 112 id. 167; *Bascom v. Weed*, 53 Misc. Rep. 499, 105 N. Y. Supp. 459.

Sale because of deterioration of property. ¶ 335.

Provision has been made whereby a trustee may sell trust lands when for the interest of the trust estate, or may lease the same for more than a period of five years.

Action by majority. See ¶ 179.

There seems to be no rule of law which prevents a testator from empowering trustees to act by a majority thereof. The general rule is that, where more than one trustee is appointed, all must join in order to make their action legal. There are no exceptions to this rule, and any attempted departure therefrom by direction of the testator must be strictly construed, and the power to act by less than the full number of trustees must be

limited to the acts specifically designated in the will, and may not be enlarged by implication. *Bascom v. Weed*, 53 Misc. Rep. 499, 105 N. Y. Supp. 459.

Unlike trustees, who must act unitedly, one executor may effectually bind or dispose of assets of the estate by his single act. *Leitch v. Wells*, 48 N. Y. 585, 601.

Conveyance by one trustee.

Where the sole qualifying trustee is also sole beneficiary, he can sell and convey the property, where by the terms of the will such power is given absolutely. *Weeks v. Frankel*, 197 N. Y. 304.

No necessity for actual conveyance.

It is not always necessary for a trustee in closing the estate to make a deed of property to the remainderman or devisee. Where the will in terms devises the fee, the trustee need not actually "convey," although the will authorizes him to do so. *Hutchings v. Hutchings*, 144 App. Div. 757, 129 N. Y. Supp. 622.

¶ 339 Reaching Income of Trust Fund to Satisfy Debt of Beneficiary to the Testator or to Other Persons.

Application of income to payment of debt of beneficiary to testator. See ¶¶ 197, 341, 392.

The beneficiary owed a debt to testatrix. *Held*, that the will showed a clear intention to place the income beyond the reach of the estate as a creditor. *Matter of Temple*, 36 Misc. Rep. 620, 74 N. Y. Supp. 479.

A trustee cannot be allowed to retain the income of a trust fund to pay a debt due from the beneficiary to the testator, even though he is an executor. The rule of retainer does not apply to a trustee. *Matter of Bogart*, 41 Misc. Rep. 598.

Trustees held a judgment against their cotrustee, who was also a beneficiary, for malfeasance. The income was not more than sufficient for his support. It was *held* that the surrogate

had no jurisdiction to direct the application of any surplus to this judgment or to pass on the question whether the income itself was so applicable. *Matter of Widmayer*, 28 Misc. Rep. 362, 59 N. Y. Supp. 980.

Where property is given to executors in trust to pay the income to a beneficiary for life, and the deceased held the note of the beneficiary, the executors should retain the income of the fund in satisfaction of such note and interest. *Matter of Foster*, 38 Misc. Rep. 347, 77 N. Y. Supp. 922; dis'd, *Matter of Knibbs*, 45 Misc. Rep. 83, 91 N. Y. Supp. 697.

Where the beneficiary denies the debt.

On judicial settlement of the executors they claimed the right to retain income of the trust fund to pay a debt of the beneficiary to the testator, and the surrogate held that he could not determine that question or whether there was a surplus of income. *Matter of Rudd*, 4 Dem. 335.

Application of income to the payment of debts of beneficiary to persons other than the testator.

Section 98 of the Real Property Law provides:

Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution.

This statute applies to a trust of personal property. *Tolles v. Wood*, 99 N. Y. 616; *Williams v. Thorn*, 70 id. 270.

It has been held that this provision of the statute is equally applicable to a trust created to receive and pay over the income of personal property. And that an action may be maintained by a judgment creditor after the return of an execution unsatisfied to reach the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent upon him. *Williams v. Thorn*, 70 N. Y. 270; *Tolles v. Wood*, 99 id. 616; *Graff v. Bonnett*, 31 id. 9; *Sillick v. Mason*, 2 Barb. Ch. 79.

Where a person has a vested interest in a fund held in trust for another, and he can transfer the same by assignment or otherwise, it can be reached by his creditors. The only property held in trust for a debtor which cannot be reached by a creditor's bill against it is that which is held in trust to receive the rents, profits and income thereof, and to apply such rents or income to the support of the *cestui que trust*; that is, an interest in trust property which the *cestui que trust* has no power to alienate by any sale or assignment executed by him. *Degraw v. Clason*, 11 Paige, 136; *Bergmann v. Lord*, 194 N. Y. 470.

Where trustees are directed to pay in their discretion income of trust fund for support of beneficiary, such income cannot be reached by supplementary proceedings, but must be reached, if at all, in a direct action. *Matter of Seymour*, 76 App. Div. 300, 79 N. Y. Supp. 122.

Bequest of personal property to four trustees and the survivor of them for the use of one of them. *Held*, that the creditors of the beneficiary could not have the income applied to his debt so long as the debtor was not the sole trustee. *Wetmore v. Truslow*, 51 N. Y. 338.

Where the will was made and probated in the State of Rhode Island, but the trustee is in this State and has the fund here, our law as to reaching the surplus of income to pay debts will apply. *Keeney v. Morse*, 34 Misc. Rep. 114, 69 N. Y. Supp. 535; *aff'd*, 71 App. Div. 104.

Where a life estate is given but no trust is created, a provision stating that the object is to have the income free from debts will not make a valid trust. *Jones v. Jones*, 28 Misc. Rep. 421, 59 N. Y. Supp. 974.

As between husband and wife; alimony.

Where judgment has been obtained by the wife for alimony, she is as to that amount a judgment creditor, and as such entitled to avail herself of all the remedies given by statute.

Where a will creating a trust for the benefit of a married man makes no mention of his wife, a just rule and a safe basis for ad-

justment, where the question of support arises between him and his wife, are furnished by treating them as one, and both are entitled to support out of the income of the estate. *Wetmore v. Wetmore*, 149 N. Y. 520; mod'g, 79 Hun, 268.

Where a trust was created for support of son's wife, son, and their children — *held*, that such rights did not depend upon the continuation of the family relation, and that, therefore, the wife did not lose her rights by a decree of divorce rendered against her. *Allen v. Farmers' L. & T. Co.*, 18 App. Div. 27, 45 N. Y. Supp. 398.

Income of a trust fund created by will for the benefit of testator's son cannot be devoted to the support of his wife under a decree for alimony after an absolute divorce in her favor when she marries again and her husband's ability to support her is unquestioned. *Wetmore v. Wetmore*, 162 N. Y. 503; rev'g, 44 App. Div. 220.

While a beneficiary may apply her income to the support of her children, an ablebodied husband is not entitled to live out of such income as against the claims of creditors. *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363, 74 N. Y. St. Repr. 19.

Wife separated from beneficiary has standing in court to maintain action for construction of will creating the trust. *Oberndorf v. Farmers' Loan & Trust Co.*, 208 N. Y. 367.

Decree for alimony has preference over debts of other creditors. *Demuth v. Kemp*, 79 Misc. Rep. 516, 140 N. Y. Supp. 152.

Claim by trustee in bankruptcy.

Even if the entire fund is surplus income within the purview of section 98 of the Real Property Law, yet, under the decision in *Butler v. Baudouine* (84 App. Div. 215; aff'd, without opinion, 177 N. Y. 530), the surplus income cannot be reached by a trustee in bankruptcy. The court said: "The provisions of section 98 of the Real Property Law, making the surplus income of trust property liable to creditors, do not contemplate and do not have the effect of creating a fund in which all creditors are at once or equally interested. The surplus is liable to claims of creditors in

the same manner as other personal property which cannot be reached by execution. The provision implies in its very terms and assumes that the surplus cannot be reached by legal process. If this section of the statute constituted the surplus a fund for equal or general distribution among all creditors another view might prevail, but as a necessary consequence of its phraseology and intent a creditor seeking the benefit of it must put himself in the attitude of one entitled to maintain a creditor's bill, namely, he must have obtained a judgment, liquidated his claim thereby, sought to enforce it by execution, and found that effort abortive by reason of the return of the execution unsatisfied." *McNaboe v. Marks*, 51 Misc. Rep. 207, 209, 99 N. Y. Supp. 960.

¶ 340 Proceeding to Reach Surplus Income.

Supplementary proceedings.

See Code (§ 2463), where it is provided that property held in trust for a judgment debtor cannot be reached in supplementary proceedings.

See also § 1391, Code Civ. Pro., and ¶ 34; *Bergmann v. Lord*, 194 N. Y. 70; *Demuth v. Kemp*, 130 App. Div. 546, 113 N. Y. Supp. 28.

Where trustees are directed to pay in their discretion income of trust fund for support of beneficiary, such income cannot be reached by supplementary proceedings, but must be reached, if at all, in a direct action. *Matter of Seymour*, 76 App. Div. 300, 79 N. Y. Supp. 122.

Or by special execution under section 1391, Code Civ. Pro. *Matter of Ungrich*, 201 N. Y. 415.

By execution. See ¶ 35.

Recent amendments to section 1391, Code Civ. Pro., permit the issue of execution against income of a trust estate to collect a judgment against a debtor-beneficiary.

Such amendment although retroactive is not unconstitutional when applied to a trust created before passing the act. *Brearley*

School v. Ward, 138 App. Div. 833, 123 N. Y. Supp. 614; aff'd, 201 N. Y. 358.

An exemption of \$12 a week of income from trust funds is exempt. § 1391, Code Civ. Pro.

An execution may be issued against a remainder in a trust fund, and a sale of the interest of its beneficiary may be had. *Cohalan v. Parker*, 138 App. Div. 849, 123 N. Y. Supp. 343.

¶ 341 **Right to Retain Principal or Income of Trust Fund to Pay Debt of or Costs Allowed Against Beneficiary.** See ¶ 197.

“Whatever equitable lien the executors might have to satisfy a debt due to their testator, it by no means follows that they have a right of retainer from income of a trust fund to satisfy a judgment for costs against the beneficiary. The cases which maintain the right of retainer are based upon the principle that the giving of a legacy to a debtor does not forgive the debt and that the debt is an asset in the hands of the executor which he is bound to offset against the legacy. *Matter of Charlick*, 1 Dem. 34; *Matter of Rudd*, 4 id. 335; *Matter of Colwell*, 15 N. Y. St. Repr. 742. But where there is no direct gift of a principal sum to the debtor but rather to a third person or persons, it is clear that the executor has no right of retainer from the principal sum belonging to the third person to pay the debt of the life beneficiary. The duty of the executor is to pay the principal sum to the trustee named in the will by whom the income is to be collected and paid out in accordance with the direction of the will. The trustee, whether he be the executor or some other person, is not vested with the title to the debt and has no duty devolving upon him to collect a debt due the testator, and, therefore, has no right of retention or equitable lien to satisfy a debt with which he had no concern or to which he has no title. The one case reported which comes most nearly to holding the contrary doctrine is *Matter of Foster* (38 Misc. Rep. 347, 77 N. Y. Supp. 922), but the reasoning in that case does not commend itself as an authority

which ought to be followed in the case at bar. Against the *Foster* case we have *Matter of Bogert* (41 Misc. Rep. 598, 85 N. Y. Supp. 291), and against the jurisdiction of the surrogate to pass upon the questions involved we have *Matter of Widmayer* (28 Misc. Rep. 362, 59 N. Y. Supp. 980). But the executors in the case at bar do not ask to have a debt due from the beneficiary to the testator satisfied by the application of the income, but ask that judgments for costs obtained by the executors against the beneficiary be so satisfied. Thus the case falls more nearly within the facts of the *Widmayer* case, although that case would seem to be much stronger from the equitable side since the judgment was recovered for misapplied trust funds. To reach and apply to the satisfaction of these judgments for costs the income from the trust fund created by the will would seem to require proceedings entirely foreign to the jurisdiction of this court." Code Civ. Pro., § 2463; *Matter of Seymour*, 76 App. Div. 300, 99 N. Y. 616, 70 id. 270; *Matter of Knibbs*, 45 Misc. Rep. 83 (Rens. Co. Sur.); *aff'd*, on this point, 108 App. Div. 134.

Trustee had defended suit by beneficiary brought to extinguish the trust, and had judgment for costs — *held*, that the income would not be directed to be paid over. *Geissler v. Werner*, 3 Dem. 200.

Attachment.

An attachment cannot be levied upon the income of a trust fund. It can be reached only by a suit in equity. *North Am. T. Co. v. Aymar*, 33 Misc. Rep. 576, 68 N. Y. Supp. 870; *Brewster v. Power*, 10 Paige, 562; *Williams v. Thorn*, 70 N. Y. 270; *Graff v. Bonnett*, 31 id. 9; *Salsbury v. Parsons*, 36 Hun, 12.

¶ 342 Premiums Paid in Purchase of Securities for Investments of Trust Funds.

The question whether the depreciation, through approaching maturity, of a premium paid in investing and reinvesting the capital of a testamentary trust estate, should be borne by the life

tenant or by the remainderman is to be determined by the meaning and intention of the testator, derived from the language employed in the creation of the trust, the relation of the parties to each other, their condition, and all the surrounding facts and circumstances. *McLouth v. Hunt*, 154 N. Y. 179; aff'g, 92 Hun, 607.

Government bonds were part of the assets of the testatrix and were made part of the trust fund — *held*, that the loss which was taking place by the wearing away of the premiums could not be charged to the life beneficiary. *McLouth v. Hunt*, 154 N. Y. 179; aff'g, 92 Hun, 607.

Investment by trustee in government and railroad bonds at large premiums — *held*, that the loss fell upon the capital of the fund. *Matter of Hoyt*, 160 N. Y. 607; rev'g, 27 App. Div. 285.

Investment by trustee in government bonds — *held*, that a part of the income should be set apart each year to make good the loss of the premiums. *N. Y. Life Ins. & T. Co. v. Baker*, 165 N. Y. 484.

Intention of testator.

“We, therefore, adhere to the rule declared in the *Baker* case, that in the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run, while if the bonds are received from the estate of the testator, then the rule in the *McLouth* case prevails, and the whole interest should be treated as income. These rules may not work perfect justice in all cases, and we fully appreciate that there may be inconsistencies between them, but it is far better that they should be uniformly adhered to, even at the expense of a particular case, than that the administration of estates should be subjected to constant litigation and disputes. It is also to be said that unless the rule in the *Baker* case is to be observed, the relative rights of life tenant and remainderman would largely depend on the favor or caprice of the trustee who might either buy a bond bearing a high rate of interest

at a great premium and impair the principal, or buy a bond bearing a lower rate of interest substantially at par, and preserve the principal intact." *Matter of Stevens*, 187 N. Y. 471; mod'g, 111 App. Div. 773.

Distinction between gift of income from specified securities, and income from specified fund.

"There is now a settled distinction between a case where specific securities consisting of stock and bonds are bequeathed to a trustee, with a direction to pay the income and profits of these specific securities to a life beneficiary, and where a sum of money is bequeathed to trustees, with directions to invest that sum of money and to pay the income of the amount so bequeathed and invested to a beneficiary. In the latter case the trustees are bound, whatever the form of the investment may be, to preserve intact the capital of the trust bequeathed to them; and while, if in case of unexpected decline in the value of the securities, or for any other reason, the capital becomes impaired, where the trustees have acted in good faith and observed the rules of law in carrying out the trust, they are not required to make up such deficiency from the income, still, when they purchase securities at a high premium, they are justified in applying a part of the income or dividends to prevent a depreciation in the value of the securities where such interest or dividends represent in part a premium which they have paid; but a different situation is presented where a person bequeaths to trustees specific securities and directs that the income and profits of such securities be paid to a beneficiary for life, with a bequest over of such securities at the termination of the life estate. In the latter case it is the income or profits that the trustees received from the securities to which the life beneficiary is entitled, not the income of a specific fund which represents the value of the securities at the time of the testator's death."

It is now settled that where specific securities are devised, with a direction to pay the income and interest of those securities, the beneficiary is entitled to all the interest, even though the pay-

ment of all the interest would tend to reduce the selling value of the securities. *McLouth v. Hunt*, *supra*; *Matter of Rogers*, 22 App. Div. 428; *Robertson v. De Brulatour*, 111 id. 882; *aff'd*, 188 N. Y. 301.

Where the will authorizes an investment in United States bonds and shows an intention to give a daughter the whole income, premium paid on United States bonds need not be replaced by a percentage of income each year. *Lynde v. Lynde*, 113 App. Div. 411, 99 N. Y. Supp. 283.

Investments in "wasting" securities; Deduction from income.

"It is no doubt a general rule that where trustees or executors find a portion of the estate invested in what are termed 'wasting' securities, they should pay to the life tenant only so much of the income as represents a fair return upon the capital value, accumulating and retaining the residue for the benefit of the remaindermen. *Cairns v. Chaubert*, 9 Paige, 160; *Kinmouth v. Brigham*, 5 Allen (Mass.), 270. This rule is not rigid, however, and yields readily when it can be seen from the will itself, read in the light of the surrounding circumstances, that the testator entertained a different intention (2 Jarman Wills [6th ed.], 1245; Perry on Trusts [6th ed.], § 450), for as was observed by the latter author: 'If the testator conferred upon the remaindermen only the possible chance of taking what might be left by the tenant for life unexhausted, the remainderman will receive all that was intended for him and has no right to complaint.' In the present case it is worthy of note that the only living persons named in the will as remaindermen, to wit, the testator's brother and his wife and daughter, although joined in the action take no part in the controversy and do not contend for the position assumed by the defendant trust company." *Frankel v. Farmers' L. & T. Co.*, 152 App. Div. 58, 136 N. Y. Supp. 703.

¶ 343 Increase on Sale.

Where securities of a trust estate are sold for more than the inventory or purchase price, such increase is principal and not

income. *Stewart v. Phelps*, 71 App. Div. 91; aff'd, 173 N. Y. 621, no opinion; *Matter of Roberts*, 40 Misc. Rep. 512, 82 N. Y. Supp. 805.

Rule for ascertainment of capital and income as between remainderman and life tenant when a manufacturing concern is sold for stock, etc., in another company. *Matter of Rogers*, 161 N. Y. 108; aff'g, 22 App. Div. 428.

Stock dividends arising from the sale of a part of the assets of a corporation are capital and not income, and belong to the remainderman. *Matter of Curtis (Skillman)*, 29 N. Y. St. Repr. 217, 9 N. Y. Supp. 469.

Investments held for the life of a beneficiary were sold at his death and realized more than the original investment—*held*, that the increase was principal. *Matter of Gerry*, 103 N. Y. 445.

Increase over inventory.

“The third fund represents increase for which stocks sold over inventory value. It is not the rule to consider such increase income or profits. But it is said that these stocks were worth more in the market when sold than when inventoried to the trustee, and that the overplus represents income and earnings not distributed by the corporation, which have had the effect of increasing the market price. This may be in part true, but the decisions already cited hold that such earnings are not income until so declared to be such and distributable to the stockholders. Such increased market value may be due to the high rate of dividend regularly maintained, to good management, to increased opportunity, and facility for a profitable business. No one could determine what proportion of the increased market price could be allotted to each of these and many other causes for enhanced market value. There is no provision in the will requiring the life tenant to make the trust estate good for any depreciation in the market value of securities, and he would not be awarded the income accruing from natural causes.” *Stewart*

v. *Phelps*, 71 App. Div. 91; *Matter of Roberts*, 40 Misc. Rep. 512.

Bonus for payment before maturity.

Where trustees made investments in bonds at a premium, which bonds were paid before maturity with a *bonus* for such surrender, it was *held* that fees of brokers in making purchases should be charged against principal; that interest to date of redemption was income, but excess of interest allowed on account of surrender was in the nature of a premium and became principal; that loss of premium paid fell on principal. *Whittemore v. Beekman*, 2 Dem. 275.

¶ 344 **Allotment of Stocks or Bonds to Holders of Stock; Ordinary and Extraordinary Dividends.**

In the recent case of *Matter of Osborne* (209 N. Y. 450), the whole question of the apportionment of dividends as between income and principal, life beneficiary and remainderman, has been reviewed, with the result that in some respects the conflicting decisions have been explained and some rules laid down which will tend to harmonize future decisions.

Two rules were there asserted: 1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.

It is further said in the *Osborne* case that it is not alone the capital of the corporation that should be preserved, but the

capital of the trust fund, whether invested by the trustee in stocks of corporations at a premium, or acquired from the testator or maker of the trust. The surplus of the corporation existing at the formation of the trust or when the stock is purchased represents a part of the capital of the estate as fully as does the capital of the corporation. For reference to the numerous cases upon this subject and for the interpretation of such cases by the Court of Appeals, the *Osborne* case (*supra*) should be consulted.

Only part of stock issued.

Where deceased was the owner of stock in a corporation that had not issued all its stock at the time of his death, but subsequently issued the balance — *held*, that the extra stock so received was *corpus*. *Knight v. Lidford*, 3 Dem. 88.

Cases of particular corporations.

The W. U. T. Co. and the P. P. C. Co., having accumulated earnings from time to time, capitalized a portion of them and made a stock dividend thereof to its stockholders — *held*, that such shares were income and not principal. *McLouth v. Hunt*, 154 N. Y. 179; *aff'g*, 92 Hun, 607; *Lowry v. Farmers' L. & T. Co.*, 172 N. Y. 137; *aff'g*, 56 App. Div. 408; *Matter of Roberts*, 40 Misc. Rep. 512; *Stewart v. Phelps*, 71 App. Div. 91; *aff'd*, 173 N. Y. 621.

Adams Express.

The June, 1907, distribution by the Adams Express Company bonds was 1975/2400 income and 425/2400 principal. *Thayer v. Burr*, 201 N. Y. 155. For character of evidence taken to determine the question under this case, see *Matter of Baldwin*, 74 Misc. Rep. 341, 133 N. Y. Supp. 1109.

Great Northern Railway Co.

See *Matter of Bunker*, 77 Misc. Rep. 320, 137 N. Y. Supp. 104.

Options and privileges to purchase stock or bonds allotted to a stockholder.

Where a stockholder is granted an option or privilege to purchase additional stock or bonds at an advantageous rate, such option if sold realizes principal as the stock or bonds would be if the option were accepted. *Matter of Kernochan*, 104 N. Y. 618; *Matter of Roberts*, 40 Misc. Rep. 512; *Stewart v. Phelps*, 71 App. Div. 91; *Robertson v. De Brulatour*, 111 id. 882.

A new investment.

"The first of these funds is that derived from the sale of stock rights and options issued in connection with corporate stock owned by deceased, which passed to her trustee. Such rights or options enabled the trustee to purchase additional stock of such corporation on advantageous terms. This right or option had a market value, and he sold it instead of investing new money. Had he availed himself of the right he would have made a new investment, which would have consisted of new shares of stock purchased at par, but worth more than par, and such new stock would have been *corpus*. Instead of thus investing he sold the "right" for cash. The amount realized is not income but principal, as the stock would have been had it been purchased and sold." *Matter of Kernochan*, 104 N. Y. 618; *Stewart v. Phelps*, 71 App. Div. 91; *Matter of Roberts*, 40 Misc. Rep. 512.

Proportionate share of surplus and undivided profits.

Where bank stock was sold at a certain sum per share and in addition a certain sum was received as a part of the "surplus and undivided profits," such surplus and undivided profits are income and not *corpus*. *Matter of Stevens*, 47 Misc. Rep. 560; *aff'd*, 111 App. Div. 773; *mod'd*, 187 N. Y. 471. But see *Matter of Osborne*, *supra*.

Where a dividend is declared after the death of the owner of the stock from surplus, it should be ascertained what proportion was accumulated before the death as that part is *corpus*,

the remainder being income. *Matter of Harteau*, 204 N. Y. 292.

Proceeds sale of realty by corporation.

A street railroad company leased its lines and sold some real estate — *held*, that the proceeds of such sale were capital. *Matter of Elting*, 33 Misc. Rep. 675, 68 N. Y. Supp. 1118.

“The principal amount in controversy, a very large sum, received for good will on the sale of the works, cannot be deemed income, but was properly awarded to principal of the trust as an appreciation in the value of the *corpus*.” *Matter of Stevens*, 187 N. Y. 471.

Dividends declared before testator's death, but not payable until after his death.

Testator died April 20th, and on April 14th a dividend was declared payable May 2d — *held*, that such dividend was principal and not income. *Matter of Kernochan*, 104 N. Y. 618.

Rents, interest, and dividends accruing but not payable at testator's death are income going to the widow who is given the income of the residuary estate. *Matter of Franklin*, 26 Misc. Rep. 107, 56 N. Y. Supp. 858.

B. bequeathed to S. for life ten shares of New York Central Railroad Company stock. After the execution of the will and before testator's death said company issued to its stockholders interest certificates which were not payable until after his death — *held*, that S. acquired no right or interest in such certificates. *Brundage v. Brundage*, 60 N. Y. 544.

¶ 345 Proceeding to Compel Payment of Legacy or Delivery of Property by a Testamentary Trustee.

Petition to compel payment of legacy or delivery of property, etc., by a testamentary trustee.

Where a person is entitled, by the terms of the will, to the payment of money, or the delivery of personal property, by a testamentary trustee, he may present to the surrogate's court a petition, setting forth the facts which entitle him to the payment or delivery, and praying for a decree, directing

payment or delivery accordingly; and that the testamentary trustee and all other persons whose rights or interests would be affected by the decree may be cited to show cause, why such a decree should not be made. If the petitioner is so entitled, only upon the happening of a contingency, or after the expiration of a certain time, he must show in his petition, that his right to the money or other property has become absolute.

§ 2689, Code Civ. Pro.

Effect of revision. § 2804 amended.

No material change in this section except to insert "and all other persons whose rights or interests would be affected by the decree" from former § 2806. That section repealed.

Section applied.

An assignee of an interest in a trust fund is not a person "entitled by the terms of the will to the payment of money" and cannot maintain this proceeding. *Tilden v. Dows*, 3 Dem. 240.

Alleged creditors should be brought in if the fund has not been judicially determined. *Beekman v. Vanderveer*, 3 Dem. 221.

Application for payment should be made under this section, and not by motion in an accounting proceeding. *Matter of McQuade*, 157 App. Div. 344, 142 N. Y. Supp. 243.

Idem; proceedings upon return of citation.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties, and must make such a decree in the premises, as justice requires. In a proper case, the decree may require the testamentary trustee, who is unable to deliver personal property to which the petitioner is entitled, to pay the value thereof.

§ 2690, Code Civ. Pro.

Effect of revision. § 2805 amended.

The change consists in omitting the provision requiring the surrogate to dismiss the petition upon an answer being filed. In line with the complete jurisdiction, the surrogate determines all pertinent issues raised.

The following cases were decided under the former section by which the proceeding might be dismissed upon the filing of an answer:

An answer that raises an issue as to the right to commission is sufficient to oust the court of jurisdiction to compel payment. *Hurlburt v. Durant*, 88 N. Y. 121.

Where the answer provided for by section 2805, Code Civ. Pro., is filed the proceeding should be dismissed. *Matter of Odell*, 52 Hun, 88, 4 N. Y. Supp. 859, 22 N. Y. St. Repr. 498.

An allegation in an answer that there is a suit pending in Supreme Court between the trustee and the petitioner and others to settle conflicting claims to the fund and the income is not a sufficient answer. *Matter of McCarter*, 94 N. Y. 558.

Where the answer contains an allegation that the trust income has been assigned, the validity of the petitioner's claim is not effectually denied, since such income cannot be legally assigned. *Matter of Foster*, 37 Misc. Rep. 581, 75 N. Y. Supp. 1067.

A trustee authorized to expend money for the education of an infant should act without an order of the court directing each payment. *Matter of Rothaug*, 51 Misc. Rep. 548, 101 N. Y. Supp. 973.

Where executors are given an estate in trust with discretion to apply some of the principal to the support of an infant daughter of testator, the surrogate has jurisdiction to require the application of some part of the principal when it is shown that the executors are not acting fairly and honestly in refusing to make such application. *Matter of Berry*, 5 Dem. 458; *Banning v. Gunn*, 4 Dem. 337.

The trustees cannot be compelled to reimburse a general guardian for past maintenance of the ward. *Matter of Scherrer*, 24 Misc. Rep. 351, 53 N. Y. Supp. 714; *Matter of Brown*, 80 Misc. Rep. 4.

The assignee of a legacy or interest cannot maintain this proceeding. *Tilden v. Dows*, 3 Dem. 240.

Character of evidence by which amount needed for support can be ascertained discussed. *Schuler v. Post*, 18 App. Div. 374, 46 N. Y. Supp. 18.

CHAPTER XLVIII.

Guardian and Ward; Rights and Duties as to Personal and Real Property; Maintenance and Support.

¶ 346.	Guardians' duties and responsibilities.
¶ 347. § 80 (D. R.).	Guardian in socage.
§ 82 (D. R.).	Testamentary guardian.
¶ 348.	General powers of guardian and of infant.
¶ 349. § 83 (D. R.).	Respecting infant's real estate.
¶ 350.	Proceeds of sale, real or personal property.
¶ 351. § 2664.	Proceeding to obtain maintenance of infant.
¶ 352.	Support where parent is guardian.
¶ 353.	Anticipating accumulation for benefit of infant.

¶ 346 Guardians' Duties and Responsibilities.

1. A guardian, as soon as the property of his ward comes to his hands, should make and file with the surrogate an accurate inventory of the property.

2. If the funds of the ward are not invested when they come to the guardian's possession, he should invest them as soon as it can reasonably be done, and so far as possible keep the same and the income thereof invested till his ward becomes twenty-one years of age, or where by reason of death, or other causes, he is sooner called upon to account and pay over the funds to others.

3. He should procure a book and devote it exclusively to matters pertaining to the guardianship, and in it should be set down, at the time of its occurrence, every item of income and expenditure on behalf of the ward intended to be a credit or a charge against him.

4. Receipts for all expenditures, except for very trifling sums, should be taken and preserved until the final accounting.

5. Guardians should not loan the money of their wards upon personal security, for, if they do so, and the maker of such securities subsequently becomes insolvent, they will be compelled

to make good the loss to the estate, and in addition, will be compelled to bear the expenses of litigation made necessary to collect the funds thus improperly invested. The courts have generally held that trustees must invest in loans on real estate, in the bonds of the State, or of the United States, and that neither good faith, care, nor diligence will protect them in the event of loss, where this rule is departed from. No loan should be made upon real estate for more than half its value, and in every instance there should be an official search showing a clear title to the land.

If satisfactory securities cannot be obtained after reasonable efforts to do so, the money should be deposited in some savings bank where it will draw interest until securities can be obtained.

6. Guardians should deposit all trust funds as soon as received by them in some bank of good repute, because, if kept about their persons or in their dwellings, and the money is stolen or lost, or destroyed by fire, they will be liable for its loss. In *Cornwell v. Deck* (8 Hun, 122), an administratrix kept a large amount belonging to the estate in her house, and the same was stolen. The court held her liable therefor, and said that the trustee, at the present time when banks and places of safe-deposit so largely abound, would be held liable for negligence, because a man of common prudence, and acting with caution, would not retain the custody of money or valuables liable to be stolen in such a place, when he could easily deposit them in a place of safety. It is repeatedly held that if a trustee, in the exercise of his best judgment, deposits money in a bank of good repute that he is not liable in the event of the failure of the bank. A guardian having funds of his ward should not keep them in his house but deposit them in a bank.

Again, these funds should be deposited to his credit as guardian, and not to his individual account in the bank or mixed with his own funds, for if he mixes the trust funds with his own, and uses them in his business, he is liable to pay compound interest, not only as a penalty for his improper conduct in relation to the trust fund, but also to enable the ward to receive all

the interest which his money would have earned if invested and its accumulations kept reinvested.

7. Under no circumstances, no matter how great the temptation, should guardians appropriate the money of the ward to their own use. This fund should be regarded as sacred against their touch for such a purpose. In a legal sense the ward is their neighbor and his castle should be secure against the uninvited steps of him who seeks to enter for an illegal purpose. And yet, men who would not for a moment think of taking another's property without his consent, and devoting it to their own use, do not hesitate occasionally to appropriate funds in their hands, as trustees, to their own benefit or the benefit of others. In order that guardians and others having trust funds in their hands may know the danger they run by appropriating such funds to their own use, and the criminal character of such an act and the penalties to which they may be subjected, we quote section 1302 of the Penal Law.

A person acting as executor, administrator, committee, guardian, receiver, collector, or trustee of any description appointed by a deed, will, or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or of property, or other valuable thing, or any proceeds thereof, in his possession or custody by virtue of his office, employment or appointment, is guilty of grand or petit larceny in such degree as is herein prescribed, with reference to the amount of such property, and upon conviction, in addition to the punishment in this article prescribed for such larceny, may be adjudged to pay a fine, not exceeding the value of the property so misappropriated or stolen, with interest thereon from the time of the misappropriation, withholding, or concealment, and twenty per centum thereupon in addition and to be imprisoned for not more than five years in addition to the term of his sentence for larceny, according to this article, unless the fine is sooner paid.

From § 1302, Penal Law.

For an admirable statement of the duties of general guardians see *Matter of Bushnell* (17 N. Y. St. Repr. 813, 821, 4 N. Y. Supp. 472).

¶ 347 Powers and Duties of a Guardian in Socage.

Guardianship in socage was an incident of the feudal tenures existing under the English common law of real estate, and existed only where an infant under fourteen years of age was seized of real estate. No person could be a guardian in socage who could inherit from the infant; but the right of guardianship was in such of the infant's next of kin as could not take by inheritance from him the socage estate in respect of which the guardianship arose; and if there was one or more in common degree of relationship, he who first obtained possession of the infant generally had the custody of him. The guardian in socage was recognized as having an estate in the land of his ward, and he could maintain in his own name an appropriate action to recover the rents and profits and to recover damages for trespass or waste upon the land, and to recover possession of the land itself. As the common-law socage tenure was swept away by the Revised Statutes, the statutory guardianship was constituted by those statutes to take the place of the common-law guardianship in socage, and it may for convenience be called by the same name. The guardianship there constituted was like the guardianship in socage at common law, except that it continued until the infant reached the age of twenty-one years and relatives who could inherit from the infant were not excluded. *Foley v. M. L. Ins. Co.*, 138 N. Y. 333, 339; aff'g, 64 Hun, 63, 18 N. Y. Supp. 615, 45 N. Y. St. Repr. 918.

Such a guardian has no right to take or deal with the personal property of the minor, and, therefore, could not surrender a life insurance policy. *Foley v. Mutual L. I. Co.*, 138 N. Y. 333.

A mother as guardian in socage may enforce by ejectment the rights of her minor children. *Cagger v. Lansing*, 64 N. Y. 417.

Guardian in socage.

Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property with the rights, powers and duties of a guardian in socage belongs:

1. To the father;

2. If there be no father, to the mother;

3. If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred.

The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article.

§ 80, Domestic Relations Law.

A mother as guardian in socage of her minor children has the right to possession of their real estate, subject to accounting to them. *Roulston v. Roulston*, 64 N. Y. 652.

Any person who takes possession of an infant's property takes it in trust for the infant, and will be held to the same degree of responsibility as if he had been formally appointed to the office of guardian. *Cromwell v. Kirk*, 1 Dem. 599.

A guardian in socage may lease the lands of his ward for a term so long as he continues guardian or for any number of years within the minority of the ward, the lease, however, being subject to being defeated by the appointment of another guardian. *Emerson v. Spicer*, 46 N. Y. 594.

Liability of guardian to cotenants for rental value.

In *Foster v. Foster* (71 Misc. Rep. 263, 129 N. Y. Supp. 1108), cotenants were not allowed to recover rental value from the widow who occupied the property with one of the infant heirs.

Settlement of accounts.

The Surrogate's Court has general jurisdiction to settle the accounts of any person acting in the capacity of a guardian in socage as provided in subd. 7, § 2510 (¶ 14), Code Civ. Pro., and § 2726 (¶ 369).

Powers and duties of testamentary guardians.

Every such disposition, from the time it takes effect, shall vest in the person to whom made, if he accepts the appointment, all the rights and powers, and subject him to all the duties and obligations of a guardian of such minor, and shall be valid and effectual against every other person claiming the custody and tuition of such minor, as guardian in socage or otherwise. He may take the custody and charge of the tuition of such minor, and may

maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions for the benefit of his ward. He shall also take the custody and management of the personal estate of such minor and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law.

§ 82, Domestic Relations Law.

¶ 348 Some General Powers and Duties of Guardians; Some Powers of Infants.

Regarding contracts.

A guardian has no authority to make a contract to bind the ward after arriving at majority in the disposition of his time, services, or property. *Ide v. Brown*, 178 N. Y. 26; rev'g, 87 App. Div. 609.

A stepfather is under no legal obligation to maintain his stepchild, and the guardian of such child may legally contract with the stepfather for the support of such child. *Matter of Ackerman*, 116 N. Y. 654; *Williams v. Hutchinson*, 3 id. 312; *Hill v. Hanford*, 11 Hun, 536.

A general guardian, as such, is not entitled to the services or society of the ward, and cannot, by virtue of his office, bind the ward's person or property unless expressly authorized by statute, an authorization which is not made by statute in this State. *Ide v. Brown*, 178 N. Y. 31. It is well settled that, in general, contracts of infants may be avoided by them either before or after they arrive at their majority (*Whitmarsh v. Hall*, 3 Denio, 375), and this is so of an infant's contract for services. *Vent v. Osgood*, 19 Pick. 572; *Aborn v. Janis*, 62 Misc. Rep. 95, 113 N. Y. Supp. 309.

May act through attorney.

A guardian may lawfully give a power of attorney to another to discharge a mortgage due his ward. *Forbes v. Reynard*, 113 App. Div. 306, 98 N. Y. Supp. 710; *Gates v. Dudgeon*, 173 N. Y. 426; rev'g, 72 App. Div. 562, 76 N. Y. Supp. 561.

Bind his ward by admissions.

The power of a guardian to bind his ward by his admissions is more limited than that of an agent acting for an adult principal. The court will not permit the right of a ward to be prejudiced by the admission of a guardian. *Buffalo L. T., etc. v. Knight T., etc.*, 126 N. Y. 450.

Provide medical attendance.

Duty to furnish with proper medical attendance. *People v. Pierson*, 176 N. Y. 201; rev'g, 80 App. Div. 415, 81 N. Y. Supp. 214.

Guardian may sue.

"It is undoubtedly the rule that where a cause of action exists directly in favor of an infant, the action should be brought through a guardian *ad litem*; but there are cases, in which the general guardian may sue as the trustee of an express trust (*Thomas v. Bennett*, 56 Barb. 197; *Bayer v. Phillips*, 10 Civ. Proc. 227; *Baxter v. Lancaster*, 58 App. Div. 380, 68 N. Y. Supp. 1092; *Rockwell v. Merwin*, 45 N. Y. 166)." *Schlieder v. Dexter*, 114 App. Div. 417, 99 N. Y. Supp. 1000.

Personal dealing with funds.

A person receiving checks from a guardian signed by his name and title for a debt having no connection with the estate of the ward is put on inquiry by the form of such signature and may be made liable for such money. *Cohnfield v. Tanenbaum*, 176 N. Y. 126; rev'g, 58 App. Div. 310; *Gerard v. McCormick*, 130 N. Y. 261.

A guardian has no right to do business with his ward's money, and if he does any debts he incurs will be his debts and not those of his ward. *Warren v. Union B. of R.*, 157 N. Y. 259; rev'g, 28 App. Div. 7, 51 N. Y. Supp. 27.

Investment of funds.

"A guardian has no authority to invest upon personal security, upon bond, promissory note, or other personal security, and if he does he shall be personally answerable if the security prove de-

fective." *Bogart v. Van Velsor*, 4 Edw. Ch. 718, 722; *Ackerman v. Emott*, 4 Barb. 626.

"A guardian should not loan the money of his ward upon personal security." *Matter of Bushnell*, 17 N. Y. St. Repr. 813; *S. C.*, 4 N. Y. Supp. 472.

"The guardian has no right to invest the property of the infant in bank stock." *Ackerman v. Emott*, 4 Barb. 626.

Where a guardian makes an improper investment (in a note) and the ward accepts the same on becoming of age, it is too late to offer to return it on an accounting. *Matter of Klunck*, 33 Misc. Rep. 267, 68 N. Y. Supp. 629.

The classes of securities in which a guardian may invest are mentioned in section 85, Domestic Relations Law. (¶ 336.)

General guardian may petition in behalf of his ward for change of name.

Consult Code Civ. Pro., §§ 2410-2417.

A petition for leave to assume another name may be made by a resident of the state to the county court of the county in which he resides, or, if he resides in the city of New York,* either to the supreme court, or to the city court of New York. The petition of an infant shall be made by his general guardian, or by the guardian of his person, or by his next friend.

§ 2410, Code Civ. Pro.

Appointment and rights of guardian of an infant who is incompetent.

An infant may be an imbecile or a lunatic, and it may be a question whether a guardian or a committee should be appointed to have charge of his person and estate.

Section 2320, Code Civ. Pro., does not restrict the appointment of a committee by the Supreme or County Court on account of age, so that a committee may be appointed under that section for an infant incompetent.

Neither does section 2643, Code Civ. Pro. (¶ 95), regarding appointment of general guardians by the Surrogate's Court restrict such appointment to infants of sound mind.

Manifestly either court may exercise that jurisdiction as to infants under 14 years of age; and by the recent amendment of section 2645, Code Civ. Pro. (¶ 96), an infant over 14 years of age, who is required to make a petition for the appointment of a

guardian, may have a petition made by another, if he is of unsound mind. Therefore, either a committee or a general guardian may be appointed for an infant of unsound mind.

Rights of guardian of infant incompetent.

A general guardian of an infant incompetent by reason of idiocy or lunacy may exercise the general powers of a committee and a committee need not be appointed. *Matter of McMillan*, 126 App. Div. 155.

Payment of attorney's fees from recovery.

By section 474, Judiciary Law, the attorney must procure the allowance of his compensation from a recovery had in behalf of an infant from a judge of the Supreme Court before the same can be paid by the guardian.

Recovery of real estate.

A general guardian as guardian in socage may contract with an attorney in a proper case to pay him one-third the value of real estate recovered for the ward. *Matter of Hynes*, 105 N. Y. 560.

The surrogate cannot order a general guardian to pay a claim of attorneys for recovering real property for the benefit of the infant. *Matter of Hampton v. Stoehr*, 1 Pow. Sur. Rep. 172.

What an Infant May Lawfully Do.

May become partner.

An infant may become a partner and will be liable for debts until a plea of infancy is made. *Continental Nat. Bank v. Strauss*, 137 N. Y. 148.

May ratify his purchase.

Where an infant has purchased real estate and has taken and continued in possession after becoming of full age he will be deemed to have ratified the contract of purchase. *Henry v. Root*, 33 N. Y. 526.

¶ 349 Duties and Liabilities of Guardians Respecting Infant's Real Estate.

A general guardian or guardian in socage shall safely keep the property of his ward that shall come into his custody, and shall not make or suffer any waste, sale or destruction of such property or inheritance, but shall keep in repair and maintain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his possession; and shall deliver the same to his ward, when he comes to full age, in at least as good condition as such guardian received the same, inevitable decay and injury only excepted; and shall answer to his ward for the issues and profits of the real estate, received by him by a lawful account to be settled before any court, judge or surrogate having authority to settle the accounts of general and testamentary guardians; and any order, judgment or decree in any action or proceeding to settle such accounts may be enforced to the same extent, and in like manner as in the case of general and testamentary guardians. If any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward treble damages.

§ 83, Domestic Relations Law.

The statements contained in most letters of guardianship issued by the Surrogates' Courts are taken from this section.

Duty of Guardian as to Ward's Real Estate.

The guardian has no title to the infant's real estate, cannot sell it or receive the proceeds of any authorized sale, except upon complying with certain conditions. His general bond covers only the personal property and the income from real property.

Duty of guardian as to recovery of ward's real estate.

The right to the possession of the real estate of the ward carries with it the corresponding duty to obtain such possession, and if wrongfully withheld, the guardian should sue for it. In imposing this duty upon the guardian the law necessarily gives to him the right to employ counsel, and, of course, to make a contract for his compensation. *Matter of Hynes*, 105 N. Y. 560; *Taylor v. Bemiss*, 110 U. S. 42.

A general guardian can control the real estate of his ward and lease, manage, and protect the same. *Lamb v. Lamb*, 76 Hun, 186, 57 N. Y. St. Repr. 335; aff'd, 146 N. Y. 317.

Purchase of real estate.

Where a surrogate authorizes a guardian to purchase a house for his ward, there is no conversion of personal into real estate. *Matter of Bolton*, 159 N. Y. 129; aff'g, 37 App. Div. 625, 56 N. Y. Supp. 1105.

Dealings with real estate.

Where the real estate in which the husband had a tenancy by curtesy has been sold and the fund paid to the husband who is also the general guardian of his children, the surrogate has no jurisdiction to compel the father to give additional security to protect the fund. *Matter of Camp*, 126 N. Y. 377.

A guardian gave mortgage on his own property to his ward and then sold the property on foreclosure—*held*, that the mortgage was valid as far as the purchaser under foreclosure was concerned, and as the amount of the mortgage was realized the ward had no ground for complaint. *Lyon v. Lyon*, 67 N. Y. 250.

A general guardian of an infant over fourteen years old has power, for a valuable consideration and acting in good faith, to release and discharge a claim for trespass on the lands of the ward. *Torry v. Black*, 58 N. Y. 185.

¶ 350 Sale of Infant's Real Estate; When Proceeds Are Personal Estate and When They Remain Real Estate.
See ¶ 197.

There are certain statutory provisions for the sale of infant's real estate, and the proceeds on such sales remain real estate.

Real estate, however, having been devised subject to a power of sale may be sold under such power, and then the proceeds are personal estate. In the first class of cases, after an infant has become vested with the title to real estate, proceedings are instituted against it for special purposes and it is proper to hold that

by such proceedings a change in the nature of the infant's property shall not be accomplished which he himself could not bring about. In the other case, however, the title to the real estate when it descends to the infant is charged with and subject to a certain power which the testator has a perfect right to create. While he owned the real estate and had the power to make any disposition or change of it he desired, he could make his will and confer upon another the same power to change its nature after the title had gone to his heirs. The disposition made in such a case is in pursuance of an authority conferred before the infant gets his title and subject to which he takes it. It would be embarrassing and confusing to hold that as between the infant and others such money continued to be real estate until some one, possibly three or four generations distant, became invested with an age and power enabling him to fix upon it the character of personal property. *Matter of McKay*, 75 App. Div. 78; mod'g, 37 Misc. Rep. 590, 75 N. Y. Supp. 1069.

Proceeds infant's real estate; realty.

Where infant's real estate had been sold during his life and the proceeds deposited with the county treasurer, and the infant died before arriving at age — *held* that the proceeds were still real estate, and descended to the heirs-at-law. *Matter of Woodworth*, 3 N. Y. St. Repr. 227.

Where real estate owned by infants in common with others is sold in partition the proceeds remain real estate and pass to the infant as such. *Horton v. McCoy*, 47 N. Y. 21.

Claims by guardian against ward cannot be basis for sale of real estate.

An equitable claim by a guardian against his ward furnishes no basis for the maintenance of a statutory proceeding to mortgage the infant's real estate. *Warren v. Union Bank of R.*, 157 N. Y. 259; rev'g, 28 App. Div. 7, 51 N. Y. Supp. 27.

Advancements for the support of infants from the estate of the infant's father by the administrator of such estate should be settled in the accounting of such administrator before the sur-

rogate and do not become a debt of the infants for which real estate can be sold. *Matter of Wyckoff*, 50 Misc. Rep. 190, 100 N. Y. Supp. 417.

Proceeds of sale of infant's real estate ordered paid to guardian.

Where it has been determined in proceedings for the sale of infant's real estate that such infant needs the whole of such proceeds for his support, the County Court may direct payment of such proceeds to the general guardian of the infant. The sureties on the bond of the guardian will then become liable for the due expenditure of such money and the proper accounting thereof. *Allen v. Kelly*, 171 N. Y. 1; rev'g, 66 App. Div. 623.

Supreme court; when proceeds to be paid to general guardian; petition therefor.

No money arising from the sale of the real estate of an infant shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian shall give a bond in the penalty of double the amount to be paid to him with sufficient surety to be approved by the court. In case, however, such money shall exceed the sum of five hundred dollars the court must require the guardian to give a bond of a surety company authorized to do business in this state or a bond secured by a mortgage on improved and unincumbered real property of a value of the penalty of the bond.

No order shall be made for the payment of any such moneys to any person, except upon petition, accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon.

Supreme Court Rule LIX.

Proceeds of partition sale of ward's real estate paid to guardian.

The provisions of sections 744 and 747, Code Civ. Pro., are qualified by the provisions of section 1581, Code Civ. Pro., when there is a question of the disposition of moneys belonging to infants arising in a partition action, and the provisions of the latter section will govern in such a case. By that section the investment

of such moneys must be in permanent securities in the name and for the benefit of the infant and if such money has remained uninvested in permanent securities for a space of three months, the court may direct the same to be paid to the general guardian of the infants upon his giving the prescribed bond. *Thurston v. E. P. Wilbur T. Co.*, 7 Misc. Rep. 392, 57 N. Y. St. Repr. 561, 27 N. Y. Supp. 923.

Proceeds of sale of infant's real estate under a power changes its character to personal estate.

Where a will contains a valid power to sell real estate and such sale is made, even though the title to the real estate vested in infants in common with others, such sale is a conversion of realty into personalty and the proceeds are not impressed with the character of realty. *Horton v. McCoy*, 47 N. Y. 21.

Personal estate cannot be invested in real estate, and thereby its character changed.

The Surrogate's Court, with its limited statutory power, and with no equity jurisdiction, has no authority to direct a conversion of the infant's property from personalty into realty, by which the infant would be bound when he attained his majority; or by which the infant's executor would be bound if the infant died during infancy. *Matter of Bolton*, 159 N. Y. 129; aff'g, 37 App. Div. 625.

¶ 351 Proceeding to Obtain the Application of the Infant's Property to His Education and Support.

Surrogate may direct as to infant's maintenance.

Upon the petition of the guardian of an infant's person or property; or of the infant; or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.

§ 2664, Code Civ. Pro.

Effect of revision. § 2846 amended.

This section now applies to all guardians, so that such an application can be made no matter what is the character of the guardianship.

Former section 2746 which provided in a similar way for the application to the infant's support of a legacy or distributive share paid to a guardian has been repealed. Such legacy or distributive share becomes a part of the infant's estate and is applicable to his support and education under this section.

Payment of income of trust fund. See ¶ 323.

Not in all cases should the court order income paid to the guardian. By the terms of a will creating a trust, the trustee may be directed to use and apply the income to the support of the infant, and, in such cases, the court may leave the application of such income to the trustee, instead of directing payment to the guardian.

Application by guardian.

The guardian may safely apply the income of his ward's property to his proper education and support, without obtaining authority therefor from the surrogate; but where the income is insufficient for such purpose and it is necessary to use some of the principal of the fund for such education and support, the guardian ought to apply to the surrogate for an order permitting him so to do.

This application should be made by the petition of the general guardian or may be made by a relative or other person on behalf of the infant.

The surrogate may cause notice of the application to be given to any person interested.

If the application should be made by any other person than the guardian, notice ought to be given to the guardian; if it is made by the guardian, notice ought to be given to the parent or to the person with whom the infant resides in order that the surrogate

may be informed as to the amount necessary for the support of the infant.

The surrogate should thoroughly examine into the merits of the application and make such an order as will best promote the welfare of the infant.

Where the parent is the guardian inquiry should be made as to the financial ability of the parent to support his own child since the law imposes upon the parent such duty.

Great care should be taken that the property of an infant should not in this way be acquired for the support of a parent or of other members of the family.

Where the parent is without resources but gives his child a home, the court should be liberal in providing funds for the education of the infant, since money so expended is of great benefit to the infant while often the amount received by the infant when he becomes of age is never of any real benefit to him.

Cannot pay claim.

A person having a claim against a general guardian cannot petition for an order directing the payment of such claim, as there is no provision for such a proceeding. *Welch v. Gallagher*, 2 Dem. 40.

The personal claim of a guardian against his ward cannot be ordered paid under this section. *Matter of Tyndall*, 48 Misc. Rep. 39, 96 N. Y. Supp. 222.

To whom payable.

The court should not order money paid over by a guardian for the support of an infant to a person who is in no way amenable to this court for its application. *Quin v. Hill*, 6 Dem. 39, 19 N. Y. St. Repr. 830; *Houghton v. Watson*, 1 Dem. 299.

For past support.

An allowance for past maintenance may be made on an application under this section. *Matter of Rylance*, 25 Misc. Rep. 283, 55 N. Y. Supp. 433.

Where the expenses are such as would have been authorized by a prior order they may be allowed upon a judicial settlement. *Matter of Klunck*, 33 Misc. Rep. 267, 68 N. Y. Supp. 629.

An allowance for past maintenance may be made a mother who is the guardian of her son and who has supported and maintained him during his minority. *Matter of Winsor*, 5 Dem. 340.

A guardian was allowed on judicial settlement a fair amount for board of the infant, although no order therefor had been previously obtained. *Matter of Ward*, 49 Misc. Rep. 181, 98 N. Y. Supp. 923.

Reference.

A reference may be ordered to take the testimony and report under section 2536 (¶ 15), Code Civ. Pro. *Matter of Rylance*, 25 Misc. Rep. 283, 55 N. Y. Supp. 433.

Application should be made to the surrogate's court, and not to the supreme court.

All such applications should be made to the Surrogate's Court. The reasons therefor are well stated in *Kirkland v. Nassau Elec. R. R. Co.*, 70 Misc. Rep. 583, 129 N. Y. Supp. 290, as follows:

"The surrogate has a splendidly equipped bureau for the keeping of records of infants' estates, and I am opposed to the many indiscriminate applications to the justices of this court for the payment of trust funds of an infant for his support. If such applications are made to the surrogate, his records constantly inform him of the condition of the infant's estate, and on the arrival of the infant at majority something beneficial to the infant is of record, and probably on deposit, rather than a number of orders on file made by the justices of this court which without a system or record have gradually depleted, and perhaps extinguished, the entire fund. Under the Code (§ 2660 *et seq.*) the surrogate's powers are complete, particularly those relating to an annual compulsory accounting by guardians on the surro-

gate's own initiation, and, while, of course, the Supreme Court has the amplest jurisdiction, the best interests of the infant will be subserved by remitting such applications to the surrogate, which, in the exercise of what I believe to be a sound discretion, I direct shall be done in this case."

¶ 352 Allowance for Support Where Parent is Guardian.

The guardian should expend no more than the income of the ward for his support and education, without an order of the court for that purpose obtained.

In 4 Redf. 360, the following is stated to be the law when the parent is the guardian of his child: "It is then no part of the duty of a guardian, simply as such, to contribute to the support of the ward out of his own funds, but it is the primary duty of a parent, whether father or mother, if of sufficient ability. Without regard to this duty, imposed by the law of nature, our statutes expressly recognize the obligation of the parent to prevent the child from becoming a public charge. If, however, the parent be also the guardian of a minor, having an estate of its own, then the circumstances of the parent as well as the amount of the estate of the ward may be taken into consideration in fixing the degree of, and determining whether there is any liability of the former. *Matter of Burde*, 4 Sandf. Ch. 617; *Matter of Kane*, 2 Barb. Ch. 375; *Wilkes v. Rogers*, 6 Johns. 566. The same cases also establish the principle that an allowance may be made for past maintenance and support of a ward in a proper case. No inflexible rule can be established, but each case must be determined on the facts peculiar to it. The proper course to pursue, when the income is insufficient, is for the guardian to make application to the court for leave to use so much of the principal as may be necessary; but in case he proceed without such leave, the court may, if the proceedings seem to have been wise, and for the welfare of the ward, sanction it."

It is the settled law of this State that the obligation to support, maintain, and educate the infant rests upon the father when the father is of sufficient ability to discharge the obligation. Where the parents are not living the duty to provide support, maintenance, and education is devolved upon the general guardian and may be taken out of the estate of the infant. Where the necessities furnished to an infant are so furnished upon the credit of the parent or under contract with the parent or general guardian, no liability is established against the infant even though the infant has a separate estate. *Goodman v. Alexander*, 165 N. Y. 289; *Wailing v. Toll*, 9 Johns, 141; *Gay v. Ballou*, 4 Wend. 403; *Murphy v. Holmes*, 87 App. Div. 366, 84 N. Y. Supp. 806.

In fixing the amount, if any, to be allowed from the ward's estate for support, the circumstances of the parents and their ability to support the ward must be considered. *Voessing v. Voessing*, 4 Redf. 360.

The surrogate may inquire into the financial condition of the father of an infant to determine whether any part of the infant's estate should be used to maintain and support such infant, and the application should not be denied solely upon the ground that a parent survives whose legal duty it is to support the infant. *Suesens v. Daiker*, 117 App. Div. 668; *Matter of Brown*, 80 Misc. Rep. 4.

¶ 353 Anticipation of Directed Accumulation. See ¶ 325.

When a minor, for whose benefit a valid accumulation of the income of personal property has been directed, shall be destitute of other sufficient means of support or education, the supreme court, at special term in any case, or, if such accumulation shall have been directed by a will, the surrogate's court of the county in which such will shall have been admitted to probate, may, on the application of such minor or his guardian, cause a suitable sum to be taken from the moneys accumulated or directed to be accumulated, to be applied for the support or education of such minor.

§ 17, Personal Property Law.

Petition of general guardian granted where distribution of principal and income was directed to be made on arrival of in-

fant at twenty-five years, or on his prior death. *Matter of Wagner*, 81 App. Div. 163, 80 N. Y. Supp. 785.

Petition granted where income was to be accumulated and paid to legatee upon her arriving at majority, and upon her prior death to other persons named. *Matter of Lehman*, 2 App. Div. 531, 74 N. Y. St. Repr. 268.

Rents and profits of real estate.

Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate's court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.

§ 62, Real Property Law.

Notice in the provision as to rents of real estate it is the minor "entitled to the expectant estate" who may have the benefit of the statute.

CHAPTER XLIX.

Accounting and Intermediate Settlement, Voluntarily and by Order; Accounting by Representative of Deceased Executor, Administrator, Guardian or Testamentary Trustee.

- ¶ 354. General plan of revision.
- ¶ 355. Concurrent jurisdiction of supreme and surrogate's courts.
- ¶ 356. Outline of various proceedings.
- ¶ 357. § 2719. Voluntary settlement without letters, and by agreement.
- ¶ 358. Contents of account.
- ¶ 359. § 2721. Intermediate account voluntarily filed.
- ¶ 360. § 2722. Intermediate account by order of court.
- ¶ 361. § 2723. Annual voluntary settlement.
- ¶ 362. § 2724. Compulsory intermediate settlement.
- ¶ 363. § 2725. Account of representative of deceased representative.
- ¶ 364. Petition, citation and answer.
- ¶ 365. § 2535. Consolidation of proceedings.
- ¶ 366. Proof of receiving property.
- ¶ 367. Abatement and revivor of proceeding.
- ¶ 368. Decree disposing of assets.
Accounting by representative of deceased incompetent.

¶ 354 General Plan of Revision of Sections on Accountings and Judicial Settlements.

Heretofore there have existed separate sections concerning accountings and judicial settlements by executors and administrators, and by guardians and testamentary trustees. The same requirements and principles, in a large measure, governed all of them. These sections have been combined so that the provisions relating to the three classes of officers are now generally found in one section.

It has been the plan to hasten judicial settlements as much as possible, and therefore the time required for giving many notices has been shortened. Heretofore the judicial settlement of the account of an administrator could be had at the expiration of the

publication of notice to creditors, but that of an executor could not be had until the expiration of one year from the grant of letters. Now the same rule applies to both accountings. In most cases the long delay between grant of letters and judicial settlement was needless, and was a cause of just complaint against the administration of the law in Surrogates' Courts.

Provision has been made for more frequent intermediate accountings by trustees and guardians, whose accounts, by their nature cannot be finally settled until the lapse of many years.

Recording agreements settling accounts have been more fully authorized, by which the parties interested may settle, as between themselves, all matters of account and discharge the representative without a formal court proceeding.

¶ 355 Concurrent Jurisdiction of Supreme and Surrogate Courts.

The Supreme Court has concurrent jurisdiction with the Surrogate's Court to call an executor or administrator to an account, and will entertain an action for that purpose when it is shown that the circumstances of the case are such as to require relief of a nature which could not be obtained in Surrogate's Court. *Citizen C. N. B. v. Toplitz*, 113 App. Div. 73, 98 N. Y. Supp. 826; *Haddow v. Lundy*, 59 N. Y. 320; *Saunders v. Soutter*, 126 id. 193.

No proceeding for an accounting of executors in the Supreme Court will even be permitted, unless special reasons are shown why such an accounting cannot or ought not to be taken in the Surrogate's Court. That court is the proper tribunal for such proceedings and it is not necessary or proper to remove them into another court, in the absence of special reasons which require that course to be taken. *Matthews v. Studley*, 17 App. Div. 303, 45 N. Y. Supp. 201; *aff'd*, 161 N. Y. 633.

While the Supreme Court has jurisdiction to compel an executor to account, it has consistently refused to exercise such

jurisdiction, unless under circumstances which require the interposition of a court of equity, rather than the usual proceedings before the surrogate. *Volhard v. Volhard*, 119 App. Div. 266, 104 N. Y. Supp. 578.

The Supreme Court and the Surrogate's Court have concurrent jurisdiction to require executors and trustees and in case of their death, their personal representatives, so far as property has come into their hands, to account for their acts, and ordinarily the Supreme Court will refuse to exercise its jurisdiction; but where the jurisdiction of the Surrogate's Court is insufficient to determine all of the questions necessarily involved, the Supreme Court will exercise jurisdiction. *Hard v. Ashley*, 117 N. Y. 606; *Douglas v. Yost*, 64 Hun, 155; *Strong v. Harris*, 84 Hun, 314; *Blake v. Barnes*, 28 Abb. N. C. 401, 45 N. Y. St. Repr. 130.

The Supreme Court and the Surrogate's Court have equal jurisdiction in regard to many matters, and there is no statutory rule which provides that, in the event of one tribunal acquiring jurisdiction such jurisdiction shall thereupon become exclusive; but, in view of the fact that, if it were otherwise, there would be a multiplicity of proceedings to accomplish the same results and that litigants might thereby be subjected to undue annoyance and additional labor be imposed upon the courts, the courts have confined the parties to the tribunal which first acquires jurisdiction of the proceeding.

In this matter the rule is well stated in *Ludwig v. Bungart* (48 App. Div. 613, 63 N. Y. Supp. 91), as follows: "The rule is that where both tribunals have equal jurisdiction the case should be retained and disposed of in the forum where judicial action was first sought." This rule was applied in *Matter of Hojer* (107 App. Div. 624, 95 N. Y. Supp. 1136), in which it was held that where there were certain matters at issue in one court which could not be disposed of in the other, the second court was not ousted of jurisdiction by reason of the prior application to the first tribunal.

The sole question, therefore, in any case where this rule is invoked, is to see if the court which has first taken up the consideration of the matter has everything before it which could be decided in the proceeding in any other court. *Matter of Llado*, 50 Misc. Rep. 227, 100 N. Y. Supp. 495.

Demurrer not proper.

If an accounting proceeding is brought in the Supreme Court, a party interested may move at the trial for a dismissal on the ground that the Surrogate's Court has power to settle all the questions at issue; but a demurrer is not proper as the Code makes no provision for a demurrer for such purpose. *Mildeberger v. Franklin*, 130 App. Div. 860, 115 N. Y. Supp. 903.

Proof when no voucher is produced is the same in both courts.

The Supreme Court will not take jurisdiction of an account where the sole reason therefor is a desire to evade the stringent method of proving payments for which vouchers are not produced, since the rule in both courts is the same. *Matter of Smith*, 120 App. Div. 199, 105 N. Y. Supp. 223.

Concurrent Jurisdiction to Take and Settle the Accounts of Testamentary Trustees.

The Supreme Court has jurisdiction concurrent with that of Surrogate's Court to require the accounting of a testamentary trustee and to settle such account.

The jurisdiction granted to the surrogate is not exclusive and has not deprived the Supreme Court of its original jurisdiction over trusts and trustees. *Cass v. Cass*, 61 Hun, 460, 16 N. Y. Supp. 229, 41 N. Y. St. Repr. 36; *Wager v. Wager*, 89 N. Y. 161, 168; *Wood v. Brown*, 34 id. 337.

No proceeding for an accounting of the representative in the Supreme Court will ever be permitted unless special reasons are shown why such an accounting cannot or ought not to be taken in the Surrogate's Court. That court is the proper tribunal for such proceedings, and it is not necessary or proper to remove

them into another court, in the absence of special reasons which required that course to be taken. *Matthews v. Studley*, 17 App. Div. 303, 45 N. Y. Supp. 201; aff'd, 161 N. Y. 633.

Where the right to an accounting in Surrogate's Court depends upon the construction of the will and an action has been brought for such construction, the surrogate should not order the trustee to account pending such decision. *Matter of Ranney*, 138 App. Div. 755, 123 N. Y. Supp. 542.

Trustee appointed in Supreme Court.

A judicial settlement of the accounts of a trustee appointed in Supreme Court may be had in Surrogate's Court. This question had been unsettled for some time until the Court of Appeals decided the question in favor of the jurisdiction of the surrogate. *Matter of Runk*, 200 N. Y. 447.

If, however, the original appointment was made by the Supreme Court, the accounting may properly be in that court. *Matter of Leavitt*, 135 App. Div. 7, 119 N. Y. Supp. 769.

Where a disputed debt between the trustee and the beneficiary is involved and also the right of the trustee to retain income to apply on a debt, there is a special reason existing which makes it proper for the Supreme Court to entertain jurisdiction. *Meeks v. Meeks*, 122 App. Div. 461, 106 N. Y. Supp. 907.

¶ 356 The Following is an Outline of the Various Proceedings Which May be Taken Leading up to and Bringing About the Filing of an Account and the Judicial Settlement Thereof.

More than one accounting or judicial settlement. See ¶ 475.

There is never an accounting or judicial settlement which in theory is final. The representative is always in office invested with authority to take possession of new assets and account for the same or to render an account of any assets not embraced in a prior accounting. To accomplish this it is not necessary to

open a decree once made, but as to new property or property not accounted for, another accounting may be had. The decree is final only as to property embraced in the account. See ¶ 464. *Matter of Heaney*, 125 App. Div. 619, 110 N. Y. Supp. 80.

The various proceedings which may be taken for the purpose of compelling payment of debts, legacies, or distributive shares and of ascertaining the condition of estates and of funds, the filing of accounts, and the effect of such filing and the judicial settlement thereof are briefly outlined as follows:

Proceeding to compel payment of a debt, legacy, or any other pecuniary provision under a will or of a distributive share or of its just proportional part.

§ 2687. ¶¶ 239, 302.

Where three months have elapsed after grant of letters, and the representative has not begun the publication of a notice to creditors, any creditor of the deceased having an unrejected claim, or any person entitled to a specific bequest or to a legacy or to a distributive share may apply for citation to show cause why the same should not be paid or delivered.

§ 2691. ¶ 303.

Where any person is entitled to a legacy or other testamentary benefit, or to a distributive share, and needs the same or a part thereof for his support or the support of his family, he may apply for citation to show cause why the same should not be paid.

§§ 2689, 2690. ¶ 345.

Any person entitled to receive from a testamentary trustee any payment of money or the delivery of any property, may apply for a citation to show cause why the same should not be paid or delivered.

None of these provisions is for an accounting and the petition should not ask for an accounting. In a proper case an accounting may be ordered by the court under section 2721, ¶ 359.

An intermediate account may be filed voluntarily at any time.

Section 2721, Code Civ. Pro., provides for the filing of an intermediate account at any time. It is not in the first instance a special proceeding, as no petition must accompany the account and no citation is issued thereon. Its purpose is only to give information to persons interested and to put the transactions of the representative and his vouchers on file in the surrogate's office where they may be preserved.

An intermediate accounting may be ordered by the court at any time for the purpose of showing the condition of an estate or fund.

Section 2721 permits the court to order an intermediate account to be filed at any time, and particularly when the court is required to hear some application to decide which it is necessary for the surrogate to know the condition of an estate or fund before disposing of the application.

Voluntary intermediate judicial settlement.

§ 2723. ¶ 361.

Any executor, administrator, guardian or testamentary trustee may have a voluntary intermediate judicial settlement after one year has expired and annually thereafter. This settlement is to be made in those cases where the circumstances are such that no final judicial settlement can be had at the end of a year.

Compulsory intermediate judicial settlement of the accounts of a guardian or testamentary trustee.

§ 2724. ¶ 362.

The court upon its own motion or upon the application of a person interested may order an intermediate judicial settlement of the accounts of a guardian or testamentary trustee.

Voluntary or compulsory judicial settlement where an executor, administrator, guardian or testamentary trustee has died.

§ 2725. ¶ 363.

The representative of a deceased executor, administrator, guardian or testamentary trustee may have a judicial settlement or may be required to have a judicial settlement.

Compulsory final judicial settlement.

§§ 2726, 2727, 2728. ¶ 369.

Final judicial settlement may be ordered, upon application, in the cases of executors, administrators, guardians and trustees, where the time prescribed for final settlement has arrived, or where for any reason their powers or duties have come to an end.

Voluntary final judicial settlement.

§§ 2729, 2730, 2731. ¶¶ 378, 381.

Voluntary final judicial settlement may be had by an executor, administrator, guardian or trustee when his duties are ended and he can be relieved from his trust.

Voluntary judicial settlement by filing written agreement.

§ 2719. ¶ 357.

A voluntary judicial settlement may be had by agreement of all the parties interested at any time by filing such agreement in the surrogate's office. No citation is issued and no decree made. The force of the agreement is in its execution by all parties interested.

Voluntary final judicial settlement under limited letters.

§ 2720. ¶ 418.

When limited letters have been granted for the prosecution of a cause of action, and such recovery is not a part of the estate of the deceased person, a judicial settlement concerning the fund so recovered may be had at any time.

¶ 357 Voluntary Settlement Without Letters.

Parties of full age may arrange, settle and distribute an estate in which they are interested amongst themselves, without any formal decree of the court, and such settlement and arrangement, in the absence of fraud or undue advantage, is binding. *Matter of Wagner*, 119 N. Y. 28; aff'g, 52 Hun, 23, 22 N. Y. St. Repr. 208; *Matter of Hodgman*, 11 App. Div. 344, 42 N. Y. Supp. 1004; aff'd, 161 N. Y. 627.

A widow and only next of kin joined in a sale of an interest in a mortgage, there being no debts of the deceased — *held*, a good assignment. *Gardner v. Barden*, 34 N. Y. 433.

They may even agree to disregard a will. *Apgar v. Connell*, 79 Misc. Rep. 531, 140 N. Y. Supp. 705.

Administration by consent without letters is binding unless fraud can be shown. *Ledyard v. Bull*, 119 N. Y. 62; *Herrington v. Lowman*, 22 App. Div. 266, 47 N. Y. Supp. 863.

Agreements concerning administration of estates and settling controversies.

Agreements are sometimes made by the parties interested in an estate which cover many important transactions advantageous to such persons and by means of which important controversies which might arise are eliminated. When these agreements are fairly made and honestly carried out, they constitute a settlement and adjustment of the rights of the respective parties by which they will be held to be bound if later any one of them seeks to repudiate the agreement. While the surrogate might have power to relieve the parties from a stipulation which had relation merely to a proceeding pending before him, he ought not to assume to do so with those agreements which deal with other and more far-reaching matters and through which many persons not necessarily parties to the proceeding have acquired rights or assumed liabilities.

Good faith requires that persons who have entered into an agreement, which has been accepted and acted upon by others, should not be allowed to repudiate it for their advantage. *Matter of Richardson*, 118 App. Div. 164, 103 N. Y. Supp. 22.

Compromise and settlement.

Agreements involving abandoning a contest of a will, and for a distribution of the estate in a different manner than made in the will are enforceable. *Schoonmaker v. Gray*, 208 N. Y. 209.

Settlement of accounts may be made by written agreement filed in the surrogate's office.

It is not necessary in every case, even for the protection of the persons interested, to have a proceeding in Surrogate's Court

for the judicial settlement of the accounts of an executor, administrator, testamentary trustee or guardian.

The parties interested, may, if of full age and competent, agree upon the accounts as shown by a written agreement signed and acknowledged by them, and filed in the surrogate's office. No action is taken upon this by the surrogate, and no decree of the court is made settling such account or discharging the executor, administrator, testamentary trustee or guardian. The force and effect of the settlement is in the agreement itself, and is of itself a good discharge.

Recording instruments settling accounts in part or in whole.

There may be recorded in the surrogate's office any instrument settling an account in whole or in part, executed by one or more executors, administrators, testamentary trustees, or guardians, and one or more legatees, devisees, distributees, creditors or wards who have attained full age. Every such instrument to be recorded shall be acknowledged, or proved, and duly certified; and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument, and its due execution.

§ 2719, Code Civ. Pro.

Effect of revision. § 2502 amended.

Part of this section is taken from former section 2502 which provided for recording certain instruments acknowledging payments of money in the surrogate's office.

A part of such section has been used and this new section made, which now affords an efficient method of settling accounts by agreement.

"Acknowledged, or proved, and duly certified" is defined in section 2768, subdivision 15.

¶ 358 What All Accounts Shall Contain.

What is required to be stated and set forth in every account ordered or filed voluntarily is well set forth in *Matter of Jones*, 1 Redf. 263, as follows:

The account must state, as part of the executor's proceedings, when the inventory was filed; when the advertisements for

claims were published, and what claims were rejected by the executor, and the time and manner in which they were rejected or disputed; what suits, if any, have been commenced on such disputed or rejected claims, which of them have been determined, how determined, and which of them are pending, and the amount claimed. Also, what claims have been presented and allowed since the expiration of the publication of the advertisement for claims. If no such claims have been rejected or disputed, and no suits have been commenced, it must be so stated.

Not only are all these things material, but it is material also that the character of the debts paid, or allowed, or prosecuted, should be stated, that is, whether they are judgments docketed, etc., or debts of inferior class.

The executor must first charge himself with "the amount of the inventory." Then he shall charge himself with "the increase" to the inventory for any cause, whether direct or indirect, whether it be the "increase" of the flock or "the increase" from any property not embraced in the inventory. If there be no increase from any cause, that fact must be stated.

The sum total of these are the assets with which the executor is chargeable; and his next business is to show what has become of this sum total. The first credit is for articles perished or lost. The cause of loss must be stated, for the surrogate is to pass on the sufficiency of the excuse offered, judicially, that is, whether "lost or perished without the fault of the executor." He must credit himself with the decrease, and with the debts due the estate not collected. The fact whether they were collectible or not being a fact to be judicially determined by the surrogate, the facts justifying the credit must be stated. The fact stated that they are not collected will not justify the decree that they were not collectible. That they were not must be shown by a proper statement. He must next then credit himself with the funeral charges and expenses of the administration. He must then credit himself with moneys paid to creditors,

naming them, and then with payments to legatees and next of kin. He must state the ages, condition in life of females, of legatees, and next of kin; and if any are minors, the fact must be stated, and whether they have guardians, and how appointed. The surrogate is to pass upon the propriety of the payments, if made to the legatees and next of kin; or if not paid, he is to distribute the surplus to them; and in either case these facts are indispensable. If there is any other fact which has occurred as part of his proceedings, which may affect the estate, or the rights of any distributee, or his own rights, he is bound to state it.

He must not only state in what character his payments were made, as which to creditors, legatees, or next of kin, or for expenses for funeral charges, or of administration, distinctly, but he must produce vouchers supporting each payment when required; or in cases where no voucher is produced, he must make and present, in lieu of vouchers, his own oath positively to the fact of payment, when made, and to whom.

¶ 359 Intermediate Account Voluntarily Filed.

Filing intermediate account voluntarily or by order.

An executor, administrator, guardian or testamentary trustee may at any time voluntarily file in the surrogate's office an intermediate account, and the vouchers in support of the same. He may be required to file such account at any time, in the discretion of the surrogate, by an order made upon the petition of any person interested, or by direction of the surrogate. He may be required to attend and be examined under oath touching his receipts and disbursements or touching any other matter relating to his administration of the estate, or fund, and in the case of an executor or administrator as to any act done by him under color of his letters, or after decedent's death and before letters were issued, or touching any personal property owned or held by decedent at the time of his death.

§ 2721, Code Civ. Pro.

Effect of revision. New section.

There is combined in this section parts of former sections 2725, 2729, 2802 and 2803. It is now made to apply to guardians and testamentary trustees.

The examination which may be required is not a contest, but should be conducted to obtain further information.

Intermediate account defined.

The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement.

From § 2768, subd. 9, Code Civ. Pro.

No person interested is required to be cited, and consequently there can be no adjudication of any question involved nor a decree made. *Hancox v. Wall*, 28 Hun, 214; *Matter of Hawley*, 100 N. Y. 206; rev'g, 36 Hun, 258.

Effect and purpose of filing.

The filing of a voluntary intermediate account with the vouchers, preserves both the account and vouchers, and furnishes information to the parties interested. The examination of the accounting party which may be had is only for the purpose of preserving and furnishing additional information regarding the account, and is not in the nature of a contest.

By testamentary trustee.

Any testamentary trustee may at any time file an intermediate account which will be a landmark along the line of the execution of the trust and the sole purpose of which will be to give information to the beneficiary and in no way relieve the trustee from liability. Such an account should disclose the nature and character of the trust property, its value, the income derived therefrom, and the expenses to which the trust is subjected in its management.

By guardian.

Ordinarily a guardian will not file an intermediate account under this section, as he is required to file an annual account under section 2660, ¶ 101.

¶ 360 Intermediate Account Filed by Order of the Court.

There are two conditions which will cause the court to make an order for the filing of an intermediate account.

First. Where an executor acting as trustee, or a testamentary trustee, has allowed an unreasonable time to elapse without filing an account of his proceedings, and the situation is not one where he can have a judicial settlement. In such a case, either without an application or under one, the court may order the filing of an account. If the account can be judicially settled, an order for settlement may be made under section 2726, ¶ 369.

Second. Where an application for relief is made to the court, and it is necessary for the court to have information as to the condition of the estate or fund before determining the application. Such cases may be applications for payment of debts or legacies, applications for support, or to issue an execution.

Where an order is made for the filing of an account, certain questions may be raised, and the proceeding is provided for in section 2722, discussed in this paragraph.

Such applications are:

a. Where an application for an order permitting an execution to issue on a judgment against the executor or administrator has been made by the judgment creditor, as prescribed in section 1826, Code Civ. Pro. (See ¶ 35.)

b. On the return of the citation on application for leave to issue an execution on a judgment rendered against the decedent in his lifetime as prescribed in section 1381, Code Civ. Pro., ¶ 35.

c. On the return of a citation on application for the payment of a debt or share of an estate as prescribed in section 2687, Code Civ. Pro. (¶¶ 239, 302.)

In these cases no petition for an accounting is filed and no citation is issued; they are mere incidents to another proceeding.

Any person interested may investigate such account by examination of the accounting party (§ 2721); or may contest the account so far as his interest is affected thereby. (§ 2722.)

This permission to contest the account means that the applicant in any one of the cases specified may endeavor to show that the account filed showing the alleged receipts and disbursements

of the representative is erroneous so far as it affects his right to relief in the proceeding which he has brought.

To this end he may show more assets than the representative accounts for or that the representative has improperly disposed of such assets and is not entitled to the credits therein alleged.

When ordered.

An intermediate accounting will not be ordered where the moving papers do not show assets in the hands of the representative. *Matter of Thurber*, 37 Misc. Rep. 155, 74 N. Y. Supp. 949.

The fact that the Statute of Limitations has run against an accounting to pay a legacy is no ground for refusing an accounting where an execution is asked for. *Matter of Cong. Unitarian Soc.*, 34 App. Div. 387, 54 N. Y. Supp. 269.

Where the petition contains a prayer for general relief coupled with a demand for payment of money, the surrogate may grant a compulsory accounting. *Matter of Odell*, 52 Hun, 88, 4 N. Y. Supp. 859, 22 N. Y. St. Repr. 498.

An application for payment of income of a trust fund left for the support of an infant may be made under this section. *Matter of McCormick*, 40 App. Div. 73, 57 N. Y. Supp. 548; aff'd, 163 N. Y. 551.

Where executors hold a fund in trust but have never accounted, they may be proceeded against as executors or as trustees. *Matter of Underhill*, 35 App. Div. 434, 54 N. Y. Supp. 967; aff'd, 158 N. Y. 721.

The question of the existence of assets may be determined by means of the intermediate accounting. *Matter of Cong. Unitarian Soc.*, 34 App. Div. 387, 54 N. Y. Supp. 269.

A person entitled to a legacy upon the death of the executrix of the will, which is held in trust, may obtain information as to the acts of the trustee and the safety of the fund by this proceeding. *Matter of Jones*, 30 Misc. Rep. 354, 63 N. Y. Supp. 726; aff'd, 51 App. Div. 420, 64 N. Y. Supp. 667.

Proceedings where account is filed pursuant to order.

On the return of the order, where one is made as prescribed in the foregoing section of this article, if the respondent fails either to file his account, appear, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in section 2729, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. If it appears that the account can be then judicially settled a supplemental citation may be issued directed to the persons who must be cited on a petition for a judicial settlement of his account. The pendency of a proceeding against the respondent to compel him to account does not preclude him from presenting a petition as prescribed in section 2729. If such petition is presented at or before the return day of the order, the citation issued thereon need not be directed to petitioner in the special proceeding pending against him and the two proceedings must be consolidated. When such account is filed in connection with a proceeding then pending any party may contest the account as to any matter affecting his interest, and the decree or other determination made shall go to the extent only of determining the question or questions necessary to be decided in order to grant or deny the relief asked for in the special proceeding in which the account was ordered to be filed. Where the accounting is made a judicial settlement by the issuing of a supplemental citation or the filing of a petition as above provided, the same proceedings shall be had as on a judicial settlement.

§ 2722, Code Civ. Pro.

Effect of revision. Part of former § 2727.

This section provides the procedure where an order is made under § 2721 to file an intermediate account. The respondent may be heard as to any objections to the order, or he may allege that he can have the estate or fund ready for judicial settlement and may file a petition for that purpose. If he does not make that claim, but his account shows that the estate can then be judicially settled, the court issues a supplemental citation to all interested persons, and the proceeding becomes a judicial settlement. Where the account is filed in connection with a pending application referred to under section 2721, any party interested in that application may contest the account so far as it affects that application; for example, if the pending proceeding is one for leave to issue an execution and the account does not show any assets, the party interested may show assets.

¶ 361 Annual Voluntary Intermediate Judicial Settlement.

Voluntary intermediate judicial settlement of the account of an executor, administrator, guardian or testamentary trustee.

An executor, administrator, guardian or testamentary trustee may, at any time after one year has expired since letters were issued to him, or he was appointed and qualified, and not oftener than annually thereafter, file in the surrogate's court having jurisdiction an intermediate account and a petition for its judicial settlement.

If the surrogate entertain such application, a citation shall issue to all persons who would be required to be cited upon a voluntary final judicial settlement of such account, and the same proceedings shall be had and with like effect, so far as the settlement of such account is concerned, as though such proceeding were a final judicial settlement.

§ 2723, Code Civ. Pro.

Effect of revision. New section.

This is a new section, and although it includes representatives and trustees, it was drawn mainly to give authority for a voluntary intermediate judicial settlement of the accounts of guardians, who have never before been authorized to have intermediate settlements as trustees have. In the *Matter of Hawley* (104 N. Y. 250), it was held that a testamentary guardian could not voluntarily make and settle his account as such guardian from time to time while his ward was still an infant. It is just as important that a guardian should establish his "landmarks by the way" as that a trustee should, and often the way is longer and the need of landmarks greater.

The theory of the law has been that no disbursements made by a guardian should be taken from the fund until final judicial settlement, which rule where fully observed has caused many guardians to pay out from their personal funds large sums of money during the fifteen or twenty years of their guardianship.

It also is much safer for the interests of the infants to have frequent judicial settlements as often much benefit will be derived thereby.

Annual judicial settlement of intermediate account by trustee.

It is good practice to have a separate accounting for each trust fund where the funds have been actually separated. *Matter of Willets*, 112 N. Y. 289; mod'g, 9 N. Y. St. Repr. 321.

Trustee appointed by supreme court.

A trustee appointed by the Supreme Court may have such an intermediate accounting before the surrogate. *Matter of Runk v. Thomas*, 200 N. Y. 447.

Objections.

An immediate account of a trustee may be the subject of investigation under objections filed as to its correctness, but not as to his alleged improper disposition of a part of the assets. *Glaskin v. Sheehy*, 2 Dem. 289.

Sureties may file objections to the account since they are required to be cited as persons interested. *Matter of Sill*, 41 Misc. Rep. 270, 84 N. Y. Supp. 213.

Contents of petition which are declared as sufficient to give jurisdiction. *Matter of McCarter*, 94 N. Y. 558.

Commissions.

See section 2753, ¶ 135.

¶ 362 Compulsory Intermediate Judicial Settlement of the Account of a Guardian or Testamentary Trustee.

In a case where the guardian or testamentary trustee does not apply for a voluntary intermediate judicial settlement, and in the judgment of the surrogate such a settlement should be had in the interest of the parties, one may be ordered. This section does not include executors and administrators, because at the completion of the publication of notice to creditors, or not later than one year from the grant of letters, they should have final judicial settlements.

Compulsory intermediate judicial settlement of the account of a guardian or testamentary trustee.

The surrogate of his own motion, or upon the petition of any person interested in the fund held by a guardian or testamentary trustee, may by order direct such guardian or testamentary trustee to make and settle an intermediate account of his proceedings. The proceedings upon the return of the order shall be the same as though the respondent had filed his petition for a voluntary intermediate judicial settlement as provided in section 2723

of this title, and the decree entered shall have the same force and effect as if made in such proceeding.

§ 2724, Code Civ. Pro.

¶ 363 Judicial Settlement of the Account of a Deceased Executor, Administrator, Guardian or Testamentary Trustee.

Where the representative of an estate, or a guardian or testamentary trustee dies, it becomes important for those persons interested in the estate or fund to have a judicial settlement of the accounts of the deceased person who was holding and managing such estate or fund, and to have the estate or fund transferred to a successor so that it may be properly and promptly watched, guarded and administered.

The executor or administrator of the deceased official has no authority to continue the duties devolving upon the deceased whom he represents, but he is a trustee for those interested charged with the duty of protecting the physical safety of the property, and rendering an account of the acts and doings of the deceased, and then turning over the possession of the property to the person or persons designated by the court. See ¶ 178.

Accounting by executor, et cetera, of deceased executors, et cetera.

Where an executor, administrator, guardian or testamentary trustee dies, the surrogate's court has the same jurisdiction, upon the petition of any person who would be required to be cited upon a voluntary judicial settlement of his account to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters had been revoked, or he had been removed, by a surrogate's decree. An executor or administrator of a deceased executor, administrator, guardian, or testamentary trustee may voluntarily account for the acts and doings of the decedent, and for the trust property which had come into his possession or into the possession of the decedent. On the death of any executor, administrator, guardian or testamentary trustee while an accounting by or against him, as such, is pending before a surrogate's court, such court may continue said proceeding where his executor, administrator or successor has voluntarily made himself a party thereto or has been brought in by a citation to show cause why he should not be made a party, and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died or in a case, where the executor or administrator of said last mentioned decedent had voluntarily

petitioned for an accounting as provided for in this section. On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, the successor of such decedent, his executor or administrator, and all persons who would be necessary parties to a proceeding commenced by such decedent for a judicial settlement of his accounts shall be brought in. If upon such accounting, the surrogate finds that there can be a distribution, in whole or in part, to the parties entitled thereto, he may make a decree accordingly, and he may also therein direct payment and delivery, by the accounting party, upon such terms and security as may be proper, of the balance, if any, of said estate or fund. For the purpose of such payment and distribution the accounting party shall have all the powers and duties of the deceased representative, trustee or guardian.

§ 2725, Code Civ. Pro.

Effect of revision. § 2606 amended.

By the amendments the obscure provisions concerning revival of the proceeding upon the death of the accounting party, have been much simplified by providing that the proceeding may be continued by the voluntary appearance or compulsory bringing in of the executor, administrator or successor of the accounting party who has so died. This will prevent the recurrence of a condition where the settlement has been practically completed upon the death of the accounting party, and it has been considered necessary to begin it again. See ¶ 367.

A new authority has been added, which appears at the end of the section, which, in cases where it can be used, will greatly facilitate the settlement of estates where the death of the executor, administrator guardian or testamentary trustee occurs about the time when the estate or fund could be distributed. In such a case authority is given, if the court finds its use practical, to order a distribution directly to the persons interested, instead of to a successor, and all power to make such transfer is given to the accounting party which his predecessor had. See ¶¶ 368, 110.

¶ 364 Petition; Citation and Answer.

The petition.

When petition is made by a sole legatee he need not make a surviving executor a party. *Matter of Trask*, 49 N. Y. Supp. 825.

Where an administrator *de bonis non* has been appointed he should make the application for an accounting. *Matter of O'Brien*, 45 Hun, 281, 10 N. Y. St. Repr. 414.

The petition cannot also ask that an administrator with the will annexed be appointed, as the two applications cannot be joined. *Popham v. Spencer*, 4 Redf. 399.

A cotrustee may maintain the proceeding to require the representative of a deceased cotrustee to account. He is one of the persons interested in the estate. *Matter of Kreischer*, 30 App. Div. 313, 51 N. Y. Supp. 802.

The application to compel the executor or administrator of a deceased guardian to account may be made at once after such appointment. *Matter of Wiley*, 119 N. Y. 642; *aff'g*, 55 Hun, 248, 7 N. Y. Supp. 828.

The petition or proof should show that the petitioner has an uncontested legal right to an accounting. The surrogate cannot construe a will to determine such right. *Matter of Comer*, 72 Misc. Rep. 321, 131 N. Y. Supp. 187.

Persons to be cited.

Upon filing the petition for a compulsory judicial settlement, only the representative of the estate of the deceased executor, administrator, guardian or trustee is cited to show cause why he should not render and settle the account of the deceased person whom he represents.

If he appears and files his account, a supplemental citation will issue to all parties necessary to be cited on a proceeding for final judicial settlement.

If he appears and files a petition for judicial settlement and an account citation issues to all interested persons in the usual manner. No citation need issue to the person who makes the original application as he is already in court, neither is it necessary to cite the persons interested in the estate of the deceased person whose accounts are being settled, as they are represented by the accounting party. *Matter of Wood*, 34 Misc. Rep. 209, 69 N. Y. Supp. 491.

The answer.

Where an answer is filed setting up a prior settlement and release, such release should be filed, or the prayer of the petition may be granted. *Sayre v. Sayre*, 3 Dem. 264.

A verified denial that any property has come to the hands of the representative of the deceased representative does not require a dismissal of the proceedings. *Wood v. Crooke*, 5 Redf. 381.

Offset.

The executors of a deceased executor cannot offset claims for debts and expenses paid in a proceeding to compel them to pay over the assets to an administrator *cum testamento annexo*, but an accounting will be ordered. *Stewart v. O'Donnell*, 2 Dem. 17.

Objection that distribution has been attempted.

Where the account shows that the representative of the deceased representative has attempted to continue the administration, an objection duly made is sufficient to raise the question of the allowance of such items.

Statute of limitations.

W. died intestate in 1862 and his administrator, L. W., died leaving goods unadministered. He was succeeded by H. W., who died in 1875. In 1877 P. was appointed administrator *de bonis non* of W., and E. W. was appointed administrator for H. W. In November, 1889, P., then the only next of kin of W., sought to compel E. W. to account as representative of H. W. for goods of W. unadministered — *held*, that as against P. as next of kin the six years' Statute of Limitations had run and the ten years' statute as against P. as administrator. *Pitkin v. Wilcox*, 58 Hun, 605, 34 N. Y. St. Repr. 441, 20 Civ. Pro. Rep. 27.

Application made fifteen years after letters issued — *held*, that the statute was a bar. *Matter of Boylan*, 25 Misc. Rep. 281, 55 N. Y. Supp. 426.

The ten-year statute and not the six-year Statute of Limitations applies to an application to compel the executor or administrator of a deceased executor or administrator to account. *Matter of Rogers*, 153 N. Y. 316; *rev'g*, 92 Hun, 609.

In the case of *Matter of Longbotham* (38 App. Div. 607, 57 N. Y. Supp. 118), the *Rogers* case was apparently misapprehended.

Matter of Taylor (30 App. Div. 213, 51 N. Y. Supp. 609) was overruled in *Matter of Longbotham* (38 App. Div. 607). *Matter of Kirkpatrick*, 9 Misc. Rep. 228, 30 N. Y. Supp. 283, 61 N. Y. St. Repr. 295.

The rules of limitation as to a special proceeding are the same as if it were a civil action. *Matter of Lewis*, 36 Misc. Rep. 741, 74 N. Y. Supp. 469; *Church v. Olendorf*, 49 Hun, 439, 19 N. Y. St. Repr. 700, 3 N. Y. Supp. 557.

Sections 405 and 412, Code Civ. Pro., are applicable to Surrogate's Court and to proceedings under this section. *Matter of May (Schlesinger)*, 24 Misc. Rep. 456, 59 N. Y. Supp. 710; rev'd, on other grounds, 36 App. Div. 77.

Where the executor was a trustee to hold in trust and invest the fund and pay the income to certain children, and where the facts show that up to a certain time before his death the executor had performed acts as such representative, and that from such time to his death was not a sufficient time to allow the statute to run — *held*, that an order for an accounting would be sustained. *Matter of Irvin*, 68 App. Div. 158, 74 N. Y. Supp. 443.

Where the representative does not file petition for judicial settlement.

If the representative cited comes into court and files an account of the proceedings of the deceased representative but does not petition for a judicial settlement, and it appears to the surrogate that the filing of the account is not sufficient relief for all the parties interested, or if the petitioner asks it, the surrogate should issue a supplemental citation to all interested parties to show cause why a judicial settlement of such account should not be had.

¶ 365 Consolidation of proceedings.

At any time when two or more proceedings are pending involving in whole, or in part, the same matters, the surrogate may, in his discretion, consolidate such proceedings upon such terms as shall appear to him to be equitable and

just; but without prejudice to the power of the surrogate to make any subsequent order or decree in either or any of them.

§ 2535, Code Civ. Pro.

Effect of revision. New section.

The right to consolidate proceedings given in several former sections has been expressed in this new section applying generally to all proceedings.

Consolidation of proceedings generally.

The Surrogate's Court may at any time on its own motion or on the motion of any party to any one of two or more of such proceedings, consolidate such proceedings, but without prejudice to the power of the court to make any subsequent order in either of them.

Where one administrator is accounting and it is ascertained that the coadministrator should account also that a complete decree may be made, and he so agrees and does account, the surrogate will consolidate the accounting. *Matter of Smith*, 40 Misc. Rep. 331, 81 N. Y. Supp. 1035.

Where the parties stipulate that the time to file the account or enter an order therefor be extended and a petition for voluntary accounting is filed before the expiration thereof, the proceedings are properly consolidated. *Matter of Mulry*, 31 Misc. Rep. 78, 64 N. Y. Supp. 576.

An application to require the representative of a deceased representative to account and a proceeding by such representative for a voluntary accounting thereafter begun may be consolidated. *Matter of Shipman*, 82 Hun, 108, 31 N. Y. Supp. 571, 64 N. Y. St. Repr. 161.

A proceeding to compel an accounting cannot be consolidated with a voluntary accounting as to another fund. *Matter of Wood*, 34 Misc. Rep. 209, 69 N. Y. Supp. 491.

The order of consolidation.

The surrogate may cause the clerk to enter a short order in the order book consolidating the proceedings in a simple case where no

conditions or terms are imposed ; but in any other case the attorney may prepare and cause to be signed and filed an order reciting the facts and the terms and conditions upon which it is granted. In ordinary practice it has been deemed sufficient to recite the fact of consolidation in the decree of judicial settlement without the entry of a formal order.

¶ 366 Proof That Fund or Property Has Been Received.

Effect of inventory. See ¶ 388.

An inventory is *prima facie* evidence both as to the extent and value of the personal property left by decedent and casts the burden upon the contestant of showing either that articles were omitted therefrom or that a greater sum was realized than the appraised value. *Matter of Rogers*, 153 N. Y. 316-328 ; rev'g, 92 Hun, 609.

Where there is power of disposition.

The burden of showing the amount of property remaining in the life tenant's hands at his death, who had an absolute power of disposal, on an accounting by his administrator, is on those who seek to surcharge the account. *Matter of Ryalls*, 80 Hun, 459, 62 N. Y. St. Repr. 287, 30 N. Y. Supp. 455, 74 Hun, 205, 56 N. Y. St. Repr. 291.

But the fact that no *corpus* appears to be extant at the time of the death of the trustee or life beneficiary is not conclusive against the remainderman. *Seaward v. Davis*, 133 App. Div. 191.

The representative cannot be charged with all the estate received by the life tenant. *Seaward v. Davis*, 198 N. Y. 415.

Charging deceased guardian.

Deceased had been guardian of a minor who had become of age. Such late minor applied for payment to him of the amount of the fund by the executor of the deceased guardian—*held*, that the fund must be traced into the hands of the executor of the deceased guardian. *Matter of Hicks*, 170 N. Y. 195 ; rev'g, 54 App. Div. 582, 66 N. Y. Supp. 1028.

Charging deceased trustee.

The fact that the trustee received a certain fund under the will is not sufficient proof on which to charge his executor with that amount of money, but there must be proof that such amount not only came to the hands of the trustee, but had been in his possession when he died. *Farmers' L. & T. Co. v. Pendleton*, 179 N. Y. 486; rev'g, 90 App. Div. 607; which aff'd 37 Misc. Rep. 256, 75 N. Y. Supp. 294.

Where the assets never came into the possession or control of the representative of the deceased representative, the former cannot be charged therewith. *Matter of Hayden*, 204 N. Y. 330.

The section applied.

The executor of a deceased executor and a person interested in the estate, being the same person, cannot maintain the proceeding. *Popham v. Spencer*, 4 Redf. 399.

The administrator of a deceased executor or administrator is not authorized to make an accounting for the purpose of showing that the deceased had funds at one time in his hands which were due to persons interested and which had not been paid over at the time of his death. *Matter of Williams*, 26 Misc. Rep. 636, 30 Civ. Pro. Rep. 76, 57 N. Y. Supp. 943.

A legatee or devisee of a legatee or devisee has no right to call to account the representative of the estate creating the first legacy or devise. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410; aff'd, 195 N. Y. 509.

The surrogate has jurisdiction to ascertain the amount of the estate in the hands of the deceased executor and for that purpose he may determine the nature of that estate and certain questions between legatees and beneficiaries, *e. g.*, whether a trust fund had been set apart and whether by the will real estate was converted. *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

The law contemplates that a successor to the deceased representative will be appointed and it is to such representative that the accounting is made. *Volhard v. Volhard*, 119 App. Div. 266, 104 N. Y. Supp. 578.

Where a widow, who is also executrix, has the use of the personal estate and has it in her possession and dies, the coexecutor of her husband's estate should proceed under this section, rather than by presentation of a claim. *Shorter v. Mackey*, 13 App. Div. 20, 43 N. Y. Supp. 112.

The representative of a deceased representative who has accounted in his lifetime, but who has not paid over the money under the decree, may be required to account and pay over what came to his hands. *Matter of Collyer*, 113 App. Div. 468, 99 N. Y. Supp. 213.

The accounting by the surviving executor and by the executor of a deceased executor are separate proceedings. *Murray v. Vanderpoel*, 2 Dem. 311.

A testamentary trustee obtains his authority to act through probate of the will and qualification in Surrogate's Court and with respect to control over his acts and adjustment of his accounts he stands in the same position in that court as an executor or administrator.

The fact that the trustee may have died does not change the situation. By section 2725 of the Code of Civil Procedure the Surrogate's Court is given full jurisdiction over an accounting, voluntary or compulsory, of an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee respecting the receipts and disbursements of such deceased representative. *Post v. Ingraham*, 122 App. Div. 738, 107 N. Y. Supp. 737.

¶ 367 Abatement and Revivor of a Proceeding for Settlement.

Under the amendment of 1914 the language concerning reviving a proceeding for judicial settlement upon the death of the accounting party has been omitted, and in its place has been substituted the authority to continue the proceeding on the coming in or bringing in of the representatives of the deceased accounting party. ¶ 363.

Some of the decisions arising under the former provision for "revivor" may be useful in construing the amendment.

These cases were decided under the former provision of section 2606.

The right to revive the proceedings is recognized and provided for in section 2606 of the Code of Civil Procedure, and when revived, as here provided for, the proceedings may be continued to a final decision. This is a valuable provision for those who have been long engaged and at large expense in an accounting before the death of the accounting trustee or administrator. It was held in *Matter of Carey* (24 App. Div. 531, 49 N. Y. Supp. 32), that a surrogate has power to take up the proceedings at a point where they were left at the death of his immediate predecessor in office and decide the questions at issue on the evidence previously taken. The same rule applies in case of revival of the proceedings on the death of an administrator.

To enter a decree denying the right to revive the proceeding is in effect treating all the work done and evidence taken as a nullity—hence an order declaring the proceeding abated is a matter of interest to all the parties, and being made without notice must be held to have been made without jurisdiction. The same may be said of the entry of that part of the decree directing the payment by the petitioners of a sum of money. *Matter of Armstrong*, 72 App. Div. 286, 76 N. Y. Supp. 37.

Where a motion to compel the representative of a deceased executor to account has been made and granted and proceedings taken under it, an order will not be made to revive the proceeding, which abated upon the death of such executor for the same purpose. *Matter of Treadwell*, 85 App. Div. 570, 83 N. Y. Supp. 242; prior appeal, 77 App. Div. 155, 79 N. Y. Supp. 83. See also 37 Misc. Rep. 584, 75 N. Y. Supp. 1058.

Where testimony has been taken before a surrogate he cannot of his own motion and without notice on the death of the executor or administrator enter an order decreeing the proceedings abated, and such an order may be attacked collaterally, and on an application to revive the proceedings might be shown to be void for

want of jurisdiction and no bar to a revival for that reason. *Matter of Armstrong*, 72 App. Div. 286, 76 N. Y. Supp. 37.

Appeal.

Appeal from the order abating the proceeding dismissed as being an *ex parte* order made on surrogate's own motion. *Matter of Armstrong*, 72 App. Div. 620, 76 N. Y. Supp. 40.

¶ 368 Decree Should Direct the Assets to be Turned Over to a Successor; But in a Proper Case May Order Distribution Directly to Those Entitled Thereto.

Before the amendment of 1914, which permits distribution in this proceeding to the parties entitled, the case of *Matter of Moehring* (154 N. Y. 423) had decided that the decree could not direct payment to any other person or persons than the successor in office, and that should be and probably will be the general practice notwithstanding the amendment. There will be few cases where conditions will warrant a decree of direct distribution, for to warrant direct distribution there must be no other duties connected with the estate or fund except to pay the same to the persons entitled thereto. Where there must be further administration of the estate or fund, the property must be turned over to a successor. See ¶ 363.

On settlement of accounts of a deceased executor a fund left for the use of the widow was ordered paid to the administrator *cum testamento annexo* and not to the widow. *Matter of McDougall*, 141 N. Y. 21; rev'g, 48 N. Y. St. Repr. 933, 21 N. Y. Supp. 479.

Decree may compel delivery of property. See ¶¶ 110, 376.

The surrogate's court has also jurisdiction to compel the executor, administrator, guardian or trustee or successor of any deceased executor, administrator, trustee or guardian, at any time to deliver any property of the estate or trust which has come to his possession or is under his control, and if same is delivered over after a decree the court must allow such credit upon the decree as justice requires.

From § 2734, Code Civ. Pro.

Section 2734 also provides specifically that upon an accounting under section 2725, the decree may direct the delivery of property. See ¶ 110.

Decree may direct payment or delivery to a successor.

The payment over or delivery of property is not to be made to a legatee or person interested, but to a representative who shall complete the administration of the estate. *Matter of Trask*, 49 N. Y. Supp. 825; *Matter of Clark*, 119 N. Y. 427; *Matter of Fithian*, 5 Dem. 305, 44 Hun, 457, 5 N. Y. St. Repr. 375, 9 id. 279.

The residuary legatees cannot maintain an action for payment to themselves, since an administrator *cum testamento annexo* is vested with the right to collect the assets of the estate. *Squire v. Bugbee*, 65 App. Div. 429, 72 N. Y. Supp. 1023.

Where a trust is created by a will and the executor has never accounted or set apart the trust fund, a substituted trustee cannot have a decree directing payment of the fund to him or maintain an action for such purpose in the Supreme Court.

An accounting must be first had. *Mount v. Mount*, 68 App. Div. 144, 74 N. Y. Supp. 148; rev'g, 35 Misc. Rep. 62, 71 N. Y. Supp. 191.

Decree should determine amount of estate or fund which came to the hands of the accounting party.

The decree may adjudge that the accounting party has fully accounted for the acts and doings of the deceased representative and for the property which came into his possession or into the possession of his representative.

If evidence of additional payments or property is afterwards found, the decree may be opened and modified.

Where it is claimed that the deceased administrator had assets in his hands, the office of the decree is to determine whether at the death of the administrator any of the original estate remained in his hands. *Potter v. Ogden*, 136 N. Y. 384; aff'g, 65 Hun, 27, 47 N. Y. St. Repr. 190, 19 N. Y. Supp. 594.

The surrogate has also jurisdiction to compel the executor of

the deceased executor to deliver over any of the trust property which has come to his possession or is under his control, but he can only require the executor of the deceased executor to pay over to his successors money or property which has come into his possession or under his control. *Matter of Walton*, 112 App. Div. 176, 98 N. Y. Supp. 42.

Effect of the decree upon sureties.

With respect to the liability of the sureties in and for the purpose of maintaining an action upon the decedent's official bond, a decree against his executor or administrator, rendered upon such an accounting, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during the decedent's lifetime. See § 2584, ¶ 126.

Judgment against the executor of a deceased trustee does not bind the sureties on the bond of the trustee where the bond was executed after the default occurred. *Thomson v. Am. Surety Co.*, 170 N. Y. 109; aff'g, 56 App. Div. 113, 67 N. Y. Supp. 564.

No execution upon the decree need be issued before suing on the bond. *Van Zandt v. Grant*, 67 App. Div. 70; aff'd, 175 N. Y. 150. See also 56 App. Div. 176; aff'd, 166 N. Y. 640.

Decree not evidence of assets.

So far as concerns the executor or administrator of decedent, such a decree is not within the provision of section 2549, Code Civ. Pro., whereby a decree is made conclusive evidence of sufficient assets in the hands of the representative to satisfy the requirements of the decree.

The decree is not evidence of assets in the hands of the representative of the deceased representative. *Matter of Seaman*, 63 App. Div. 49, 71 N. Y. Supp. 376.

Decree should adjust commissions. See § 2753, ¶ 135.

The commissions properly allowable to the deceased's representative should be adjusted upon the accounting by his repre-

sentative in order that the true amount to be paid over on such accounting may be ascertained. *Matter of Hallenbeck*, 119 App. Div. 757, 104 N. Y. Supp. 568.

Accounting by committee of deceased incompetent; accounting by representative of deceased assignee; estate of lunatic; disposition in case of death.

Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed. The committee may, in such case, render to the court by which he was appointed, a final account of his proceedings touching the property of the incompetent. Such account shall contain an inventory in the form prescribed by subdivision one of section twenty-eight hundred and forty-two of this act and a full and true account in form of debtor and creditor of all his receipts and disbursements; and there shall be appended thereto an affidavit of the committee in the form prescribed by section twenty-eight hundred and forty-three of this act and there shall be filed therewith a voucher for every payment except in one of the cases specified in section twenty-seven hundred and twenty-nine of this act. Notice for the application for settlement of such account shall be given in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and, if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. And such account shall be judicially settled, adjusted and determined.

§ 2344, Code Civ. Pro.

Estate of an adjudged incompetent where the incompetent or committee has died. See ¶ 390.

The proper method of ascertaining the condition of the estate of a lunatic whose committee has died is by an accounting in the proper court. *La Grange v. Merritt*, 96 App. Div. 61, 89 N. Y. Supp. 32.

Upon the death of the lunatic, the powers and duties of the committee terminate. He must then render an account of his proceedings and dispose of the property remaining in his hands in the manner directed by the court which settles his account.

Administrator or executor appointed.

If an administrator of the lunatic's estate has been appointed, he may require the committee to render and settle his account, or the committee may make a voluntary settlement citing such administrator to attend such settlement, and he will represent the next of kin.

If the lunatic left a will which has been probated, the executor may make the application or be cited.

When there is no representative.

When no representative has been appointed the committee in settling his account must cite husband or wife and the heirs-at-law and next of kin of the deceased lunatic to attend the accounting, and they may appear and examine the account and make any contest they deem necessary.

The decree.

The decree should adjust all matters between the committee and the estate of the lunatic which arose during the life of the lunatic, and should direct the balance of the estate to be turned over to the executor of the will of the deceased or to an administrator so that the Surrogate's Court may properly make distribution thereof, after payment of funeral and other necessary expenses which may have been incurred after the death of the incompetent. *Matter of Farkel*, 8 App. Div. 400, 75 N. Y. St. Repr. 240, 40 N. Y. Supp. 849.

Where a lunatic dies after appointment of committee, that committee should account to the proper officer and the estate should be administered and settled in Surrogate's Court by an executor or administrator. *Killick v. Monroe Co. S. B.*, 17 N. Y. St. Repr. 283, 1 N. Y. Supp. 501.

Incompetent and committee both died — representative of deceased committee directed to account in Surrogate's Court to representative of incompetent. *Matter of Hall*, 75 Misc. Rep. 71, 134 N. Y. Supp. 866.

Accounting by the representative of a deceased assignee under the debtor and creditor law, § 11.

The County Court has power to compel an accounting by the representatives of a deceased assignee in the same manner as provided by law for compelling an executor or administrator to render and settle his account, and upon such accounting a citation should issue to all creditors interested in the estate. *Matter of Farmer*, 35 Misc. Rep. 150, 71 N. Y. Supp. 462, and cases there cited.

Accountings under the revised practice; time of taking effect.

Where a petition has been presented before September 1, 1914, the proceedings, until that matter has been terminated by an order or decree, must be conducted under the former law as required by section 2771. (¶ 476.) When that matter is concluded, the following proceedings, taken in the same estate, may be conducted under the new law, unless the same shall affect a right which accrued under the old law.

CHAPTER L

Compulsory Final Judicial Settlement of Accounts of Executors, Administrators, Guardians and Testamentary Trustees.

- ¶ 369. § 2726. When judicial settlement may be required.
§ 2727. Who may petition.
§ 2728. Citation and proceedings thereon.
- ¶ 370. The answer.
- ¶ 371. Statute of limitations.
- ¶ 372. What defenses recognized.
- ¶ 373. Release pleaded as a bar.
- ¶ 374. Issuing supplemental citation.
- ¶ 375. Hearing the issues.
- ¶ 376. The decree.
- ¶ 377. Warrant of attachment and discharge from imprisonment.

¶ 369 Compulsory Final Judicial Settlement.

When an estate or fund should be distributed, or for any reason the powers of the executor, administrator, guardian or testamentary trustee have ceased, and the estate or fund should be transferred to a successor the court may compel a final judicial settlement.

When surrogate's court may require judicial settlement of account.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of an executor, administrator, guardian or trustee:

1. In the case of an executor or administrator,
 - a. Where fifteen days have elapsed after the time in which to present claims has expired, or one year has expired since letters were issued to him.
 - b. Where letters issued to him have been revoked, or, for any other reason, his powers have ceased.
 - c. Where the administrator is a temporary administrator.
 - d. Where he has sold, or otherwise disposed of, any of the decedent's real property, or the rents, profits or proceeds thereof, pursuant to a power contained in the decedent's will, or an order of the surrogate's court, and fifteen days have elapsed after the time in which to present claims has expired, or one year has elapsed since letters were issued to him.

2. In the case of a guardian,
 - a. Where the ward has attained the age of twenty-one years, or has died.
 - b. Where the guardian is a guardian in socage, or the guardian of the infant's person only.
 - c. Where letters issued to him have been revoked, or his powers have ceased.
3. In the case of a trustee,
 - a. Where the trustee has been removed, or for any other reason his powers have ceased.
 - b. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready to be executed; so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee.

§ 2726, Code Civ. Pro.

Effect of revision. In part former § 2726.

This section includes guardians and testamentary trustees, and contains provisions found in former §§ 2847, 2848, 2806 and 2807. As to guardians in socage, see § 2510, subd. 7.

Former § 2807 combined with this section. Reference to the expiration of one year omitted, as that is now covered by § 2723, ¶ 361. Former § 2808 as to who may petition may be found in § 2727.

Where the trustee has died his representative may be required to account under § 2725, ¶ 363.

The application should not ask for payment of the debt or claim, but may simply ask for a judicial settlement. *Matter of McCormick*, 27 Misc. Rep. 416, 59 N. Y. Supp. 374.

Where a year has expired since letters were issued the surrogate has power, on his own motion, with or without a petition to require from the representative a judicial settlement of his account. *Matter of Stevenson (Cohen)*, 77 Hun, 203, 59 N. Y. St. Repr. 765, 28 N. Y. Supp. 362.

Trustee who has been removed.

A trustee who has been removed may now be required to account by his successor under the direct authority of this section. Heretofore there was only a general provision for accounting when letters had been revoked, and to bring a trustee within that

rule, the court construed removal as equivalent to revocation of letters. *Matter of Storm*, 84 App. Div. 552, 82 N. Y. Supp. 731.

Executor or administrator who has been removed.

Until an executor has accounted and been put into possession of the funds as trustee he is still an executor liable to account upon his removal. *Matter of Hood*, 104 N. Y. 103.

A creditor cannot call to account an executor or administrator who has been removed. *Breslin v. Smyth*, 3 Dem. 251.

Judicial settlement of accounts; temporary administrator.

The surrogate may compel a judicial settlement of the accounts of a temporary administrator at any time. § 2726, Code Civ. Pro.

Upon a settlement of the accounts of the temporary administrator the decree should direct him to turn over any balance to the permanent representative. *Matter of Philp*, 29 Misc. Rep. 263, 61 N. Y. Supp. 241.

A temporary administrator has no absolute right to demand a judicial settlement of his accounts before executors have qualified. *Bible Society v. Oakley*, 4 Dem. 450.

Where the temporary administrator has not sufficient funds in hand to pay his expenses, commissions, etc., and an executor is in office, so that the temporary administrator has no longer authority to convert the estate, the executor may be directed to pay such sums. 48 N. Y. Law J. 1386.

Compulsory judicial settlement; who may petition.

A petition praying for the judicial settlement of the accounts of a person described in the last section, and that such person may be cited to show cause why he should not render and settle such account may be presented in a case prescribed in the last section as follows:

1. Against an executor or administrator,
 - a. By a creditor or a person interested in the estate or fund,
 - b. By or on behalf of a child born after the making of the will, when interested in the estate.
2. Against a guardian,
 - a. By the ward after he has become twenty-one years of age,
 - b. By the executor or administrator of a ward who has died,
 - c. By the ward or a duly appointed guardian where a person has been acting as a guardian in socage.

3. Against a testamentary trustee,

a. By any person beneficially interested in the execution of any of the trusts, or by any person on behalf of an infant so interested, unless his account has been judicially settled within one year preceding the application.

In any case,

a. By a surety on the official bond of the person required to account, or the legal representative of such a surety.

b. By the successor, or by the remaining executor, administrator, guardian or trustee, where a representative, guardian or testamentary trustee has been removed or his letters revoked.

c. By the attorney-general of the state where any of the property or fund may belong to the state of New York, by reason of the death of any testator, intestate, or person interested without leaving known heirs-at-law or next of kin, as the case may be, or such heirs-at-law or next of kin are unknown.

§ 2727, Code Civ. Pro.

Effect of revision. New section.

This section is largely made up of former § 2727 rewritten, with which is combined former §§ 2808 and 2847, making this section apply to guardians and testamentary trustees.

The jurisdiction of the court is the same in regard to the accounts of trustees as it is with regard to accounts of executors and administrators. *Matter of U. S. Trust Co.*, 175 N. Y. 304.

A petition must be filed and a citation issued, but the proceeding in the first instance is only between the petitioner and the representative.

If it appears that the estate is in condition to be distributed a supplemental citation may be issued to all parties who would be the necessary parties to a voluntary judicial settlement, and upon their being brought in a decree may be made as in a voluntary judicial settlement disposing of the estate to those who are entitled thereto.

If, however, such supplemental citation is not issued, the decree will do no more than settle the account as between the representative and the petitioner and grant such relief to him as he may be entitled to. The pendency of this compulsory proceeding does not prevent the institution of a proceeding for voluntary judicial settlement by the representative, and when he takes that course the two proceedings may be heard together or consolidated as justice shall require.

Interested persons.

The word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses.

From § 2768, Code Civ. Pro., subd. 3.

Where a provision of this chapter prescribes that a person interested may * * * apply for an accounting * * * an allegation of his interest, duly verified, suffices although his interest is disputed; unless he has been excluded by a judgment, decree or other final determination, and no appeal therefrom is pending.

From § 2768, Code Civ. Pro., subd. 11.

Since the amendment to the Code, section 2514 (now § 2768), extending the meaning of the word "creditors," a person holding a claim for funeral expenses may institute the proceedings. Such cases as *Matter of Flint* (15 Misc. Rep. 598, 38 N. Y. Supp. 188, 72 N. Y. St. Repr. 817) are no longer applicable.

An alleged creditor, where consent of both parties has been filed to have his claim heard on the judicial settlement, may petition for judicial settlement. *Clark v. Scoville*, 111 App. Div. 35; app. dism., 185 N. Y. 541; 116 App. Div. 923; aff'd, 191 N. Y. 8.

A mere appearance of interest in the estate of a decedent is ordinarily sufficient to sustain an application to compel a judicial settlement, even though that interest is denied. *Matter of Kipp*, 17 Misc. Rep. 490, 75 N. Y. St. Repr. 669, 41 N. Y. Supp. 259; aff'd, 5 App. Div. 625; *Reilley v. Duffy*, 4 Dem. 366; *Schmidt v. Heusner*, 4 id. 275; *Matter of Laramie*, 6 N. Y. Supp. 175, 24 N. Y. St. Repr. 702.

A person is not "interested" who is given something if another consents or selects it, or desires to have such person remembered. *Matter of Steiner*, 134 App. Div. 162, 118 N. Y. Supp. 833.

Where a creditor asks for an accounting after one has been had without notice to him, alleging that the representative had actual knowledge of the existence of his claim, the surrogate should first try the question of knowledge of the representative, and then order an accounting if such knowledge existed. *Matter of Recknagel*, 148 App. Div. 268, 132 N. Y. Supp. 99.

Entitled to vested remainder.

Persons entitled to a vested remainder may maintain the proceeding. *Matter of Watts*, 68 App. Div. 357, 74 N. Y. Supp. 75; *Campbell v. Purdy*, 5 Redf. 434.

A general guardian of infants interested in a fund to come into their possession after the death of a life tenant is entitled to petition for an accounting in order to disclose the state of the fund. *Matter of Lawrence*, 15 Civ. Pro. Rep. 54, 16 N. Y. St. Repr. 971, 1 N. Y. Supp. 213.

A residuary legatee contingently interested in the estate may require an accounting. Case where the residuary legatee was given what was left, if anything, after supporting an imbecile son during life. *Matter of Hunt*, 38 Misc. Rep. 30, 76 N. Y. Supp. 968; aff'd, 84 App. Div. 159, 82 N. Y. Supp. 538, 179 N. Y. 570; *Matter of Kennedy*, 143 App. Div. 439, 128 N. Y. Supp. 626.

Assignee of a legacy may petition.

A person holding a valid assignment of a legacy or a part thereof can go into the Surrogate's Court, which is the appropriate tribunal for that purpose (*Hard v. Ashley*, 117 N. Y. 606), and call for an accounting. *Citizens C. N. B. v. Toplitz*, 113 App. Div. 77.

The legatee or the assignee of a legatee of a specific article may not petition.

Such a person has no interest in the estate except to receive the chattel specifically bequeathed. The right to receive the specific bequest where there are no debts does not at all depend upon the amount of property received by the executor or upon the disposition of the estate by him. If it is not necessary to sell the article for the payments of debts, the legatee is entitled to receive it without regard to the condition of the estate and he has his action therefor under section 1819, Code Civ. Pro. *Matter of Egan*, 89 App. Div. 565, 85 N. Y. Supp. 663.

He may also apply for the delivery thereof under section 2687, ¶¶ 239, 302.

Attorney having lien.

Attorneys having a statutory lien upon some of the assets may require an accounting. *Close v. Shute*, 4 Dem. 546.

An agreement to pay an attorney for his services part of the proceeds of recovery — *held*, not to be an assignment, and that he could not maintain the proceeding. *Matter of Shafer*, 35 Misc. Rep. 371, 71 N. Y. Supp. 1033.

Surety.

The executor of a surety on the official bond of the administrator may maintain the proceeding. *Matter of Nicholls*, 27 N. Y. St. Repr. 37, 8 N. Y. Supp. 7.

Receiver.

A receiver of a legatee may require an accounting by the executor. *Matter of Beyea*, 10 Misc. Rep. 198, 63 N. Y. St. Repr. 602, 31 N. Y. Supp. 200; *Matter of Kennedy*, 143 App. Div. 439.

Generally.

Judicial settlement in which an alleged next of kin was not cited. He applied for an accounting as though none had been had — *held*, that the practice was the proper one, instead of a motion to open the decree in the first accounting. *Matter of Killan*, 172 N. Y. 547; rev'g, 66 App. Div. 312, 72 N. Y. Supp. 714.

Interest of petitioner denied.

If the interest of the petitioner is denied it is proper for the surrogate to take evidence through a reference or otherwise to satisfy himself that the claim of the petitioner to be interested is well founded and that he has such an apparent interest that his rights should be adjudicated upon the judicial settlement after all parties interested were properly brought into court. *Matter of Laffargue*, 142 App. Div. 426, 126 N. Y. Supp. 965; aff'd, 202 N. Y. 614.

The jurisdiction of the surrogate to compel payment of a claim against an estate is confined to undisputed claims. The only

object in the surrogate's requiring an accounting upon the application of a creditor is that a decree may be made directing payment of a claim. Therefore, under ordinary circumstances, if facts are alleged showing the good faith of the representatives in disputing the claim, it is an abuse of discretion to order an accounting, as it could result in no benefit.

Where the answer, if true, shows that the claim is invalid, the surrogate should refuse to order an accounting. *Matter of Whitehead*, 38 App. Div. 319, 56 N. Y. Supp. 989.

Where a party swears that he has an interest in the estate and the papers show that he has not, the surrogate is not bound to order an accounting. *De Pierris v. Slaven*, 79 Hun, 279, 61 N. Y. St. Repr. 31, 29 N. Y. Supp. 360.

Where the interest of the petitioner depends upon a construction of the will, and a suit has been brought for such construction, an accounting will not be ordered. *Matter of Ranney*, 138 App. Div. 755, 123 N. Y. Supp. 542; also see *Reed v. Clark*, 144 App. Div. 178, 128 N. Y. Supp. 1006.

Settlement of guardian's account.

The Surrogate's Court having jurisdiction is the court of the county in which the will was proved or the deed recorded.

Petition.

The petition must pray that the person who might have so presented a petition may be cited.

The persons who may call a guardian to account are described in section 2726, Code Civ. Pro., and are the ward after he has attained majority; the executor or administrator of a ward who has died; the guardian's successor; the surety on his bond where his letters have been revoked, or the legal representative.

Citation.

A citation must be issued accordingly.

Settlement by father or mother or guardian in socage.

The general jurisdiction of the Surrogate's Court extends to taking and settling the accounts of the father or mother or guardian

in socage of an infant, even though such guardian has not been acting by virtue of a judicial appointment. § 2727.

This jurisdiction is given by subd. 7 of § 2510 Code Civ. Pro.:

7. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

Citation for compulsory judicial settlement.

Compulsory judicial settlement; citation; order to account and proceedings thereon.

On the presentation of a petition, as prescribed in the last section, a citation must be issued accordingly, and on the return of the citation if the person cited fails either to appear, or to file his account, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in the next section, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. He is bound by such an order, without service thereof. If it appears that there is a surplus, distributable to creditors or persons interested, the surrogate may, at any time, issue a supplemental citation, directed to the persons who must be cited, on the petition for a judicial settlement of his account. The pendency of a proceeding against an executor, administrator, guardian or trustee to compel him to account does not preclude him from presenting a petition as prescribed in the next section. If such petition be presented at or before the return of a citation in and as prescribed in either of the foregoing sections of this title, the citation issued thereon need not be directed to the petitioner in the special proceeding pending, and the two proceedings must be consolidated.

§ 2728, Code Civ. Pro.

Effect of revision. § 2727 amended.

The first part of former section 2727 was inserted in new section 2726, and the remainder changed to include guardians and trustees.

The section is not changed in substance. Provision for consolidation of proceedings is omitted as that is now covered generally by section 2535, ¶ 365.

Where petition for voluntary settlement is presented.

The pendency of a proceeding against an executor or administrator to compel him to account does not preclude him from presenting a petition as prescribed in section 2729, Code Civ. Pro.

If such petition is presented at or before the return of a citation in and as prescribed in either of the foregoing sections the citation issued thereon need not be directed to petitioner in the special proceeding pending against an executor or administrator, and the two proceedings must be consolidated.

¶ 370 The Answer.

An answer that the claim of the moving creditor is in dispute does not require the dismissal of the proceeding. *Matter of Callahan*, 66 Hun, 118, 49 N. Y. St. Repr. 425, 20 N. Y. Supp. 824; aff'd, 139 N. Y. 51.

Should plead the statute of limitations; not move to dismiss.

The party cited to account should not move to dismiss the petition, but should answer setting up the Statute of Limitations as a defense, since the petitioner may be able to show facts taking the proceeding out of the statute. *Matter of Jordan*, 50 App. Div. 244, 63 N. Y. Supp. 911.

The Code requires the objection to be taken by answer. § 413, Code Civ. Pro.

Sufficiency of the answer pleading statute of limitations. See ¶¶ 131, 384.

An answer which pleads the statute and only sets up certain dates is not sufficient to require a dismissal of the proceedings.

The question often presented is upon whom devolves the duty of showing that the statute has run, so as to be available as a defense to the application for an accounting. The allegation of mere lapse of time of itself would not be sufficient, because in order to make the statute available there must have been such lapse of time after the repudiation of the trust relation. In *Matter of Irvin* (68 App. Div. 158, 74 N. Y. Supp. 443), the court said, in speaking of a similar question: "Upon a proceeding of this nature it is not proper to deny the relief upon the ground that the Statute of Limitations has run against the remedy unless all the facts upon which the running of the Statute of Limitations might depend are clearly shown. A person obtaining

possession of property as executor should not be permitted to acquire title thereto by failure of those interested to require him to account unless there is no avenue of escape from such an inequitable result. If there be any doubt about the facts the better practice is to grant the order. The facts may be clearly presented on the account filed pursuant to the order or on the proceedings subsequently had thereon. This seems to have been the primary purpose of the enactment. * * * The application of the Statute of Limitations may then be determined more satisfactorily when it is sought to enforce some right based on the accounting." In *Matter of Wagner* (119 N. Y. 28), the court, in discussing the power of the surrogate to order an accounting, held that the Code provisions (§§ 2726, 2727) did not deprive the surrogate of discretion in disposing of the matter, and that where it appeared upon the face of the proceedings that there existed a bar to the accounting (in that case of a settlement out of court) the surrogate was authorized to deny the application. The effect of this decision would seem to be that the defense relied upon must be so stated that the court can see that the particular bar relied upon actually exists. When it does, a dismissal of the proceedings is justified. When it does not, then it is the duty of the surrogate to order the accounting. *Matter of Meyer*, 98 App. Div. 7; aff'd, 181 N. Y. 553.

When statute begins to run.

"It has been frequently held that the Statute of Limitations does not commence to run in favor of a trustee until he openly repudiates the trust and asserts and exercises individual ownership over the trust property." *Matter of Irvin*, 68 App. Div. 158; *Matter of Jones*, 51 id. 420; aff'g, 28 Misc. Rep. 599.

We have also in the interest of honesty extended the rule by analogy to the case of executors who are trustees in a sense, even though they be not, strictly speaking, trustees; and we have established the rule that unless the facts, upon which the running of the Statute of Limitations depends, are clear and uncontroverted, mere lapse of time is not a bar to the accounting, and

that the question as to whether the Statute of Limitations is a bar to any claim made by the petitioners should not be decided before the accounting is had." *Matter of Irvin, supra*; *Matter of Meyer*, 98 App. Div. 7; aff'd, 181 N. Y. 553.

The statute does not run between the beneficiary and trustee of an express trust, unless there has been a distinct disavowal or repudiation of the relationship by the trustee, clearly and unmistakably conveyed to the *cestui que trust*. *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Matter of McCormick*, 27 Misc. Rep. 416, 59 N. Y. Supp. 374.

The Statute of Limitations does not begin to run against a beneficiary until the trustee has openly to the knowledge of the beneficiary, renounced, disclaimed, or repudiated the trust. *Matter of Camp*, 126 N. Y. 377; *Lammer v. Stoddard*, 103 N. Y. 672.

Administrator.

An administrator is under these decisions to be considered in the same class with an executor, guardian or trustee. *Matter of Williams*, 57 Misc. 537, 109 N. Y. Supp. 974.

¶ 371 Statute Bar to Proceedings for an Accounting.

Special proceedings in Surrogate's Court against an executor or administrator to enforce an accounting are barred by the Statute of Limitations if not commenced within six years from the time when the right accrued to compel such accounting. *Matter of Elkins*, 74 N. Y. St. Repr. 299.

Where executors are bound to make annual payment to a legatee, the Statute of Limitations does not begin to run against the remaindermen for an accounting until the death of the legatee. *Matter of Campbell*, 21 Misc. Rep. 133, 81 N. Y. St. Repr. 29, 47 N. Y. Supp. 29.

The limitation of six years provided by section 382, Code Civ. Pro., applies to a proceeding by a legatee or next of kin to compel an executor or administrator to account for payment or distri-

bution. *Matter of Miller*, 15 Misc. Rep. 556, 74 N. Y. St. Repr. 299, 37 N. Y. Supp. 1129.

Application for accounting made seventeen years after issue of letters and nine years after petitioner became of age — *held*, petition should be dismissed. *Matter of Barnes*, 25 Misc. Rep. 279, 55 N. Y. Supp. 430.

A petition may be presented on behalf of an interested infant (§ 2727, Code Civ. Pro.), and the statute will not then be a defense under section 396, Code Civ. Pro. *Matter of Pond*, 40 Misc. Rep. 66, 81 N. Y. Supp. 249.

The running of the statute may be interrupted by a partial payment with the same result as a part payment upon a debt. *Matter of Campbell*, 21 Misc. Rep. 133, 81 N. Y. St. Repr. 29, 47 N. Y. Supp. 29.

A payment made to the petitioner under such circumstances as showed an acknowledgment of liability to the petitioner would prevent the running of the statute as to that person, but such payment to another would not avail the petitioner. *Matter of Elkins*, 15 Misc. Rep. 556, 74 N. Y. St. Repr. 299, 37 N. Y. Supp. 1129; *De Freest v. Warner*, 98 N. Y. 217; *aff'g*, 30 Hun, 94.

The limitation of six years provided by section 382, Code Civ. Pro., applies to a proceeding by a creditor to compel an executor or administrator to account. *Matter of Kirkpatrick*, 9 Misc. Rep. 228, 61 N. Y. St. Repr. 295, 30 N. Y. Supp. 283.

Where the estate is not to be distributed until the death of the life tenant, the right to compel an accounting does not accrue until such death. *Peltz v. Schultes*, 46 N. Y. St. Repr. 216, 19 N. Y. Supp. 637.

An administrator cannot defeat a petition for accounting filed by the receiver in supplementary proceedings of a next of kin by the defense of the Statute of Limitations. *Matter of Taylor*, 30 App. Div. 213, 51 N. Y. Supp. 609.

Petition for accounting by executrix who was also the life beneficiary of the property. Answer pleading the Statute of

Limitations — *held*, that the executrix was under the will in that case a trustee and the statute did not begin to run until the trustee repudiated the trust, which she had not done. Order for accounting sustained. *Matter of Jones*, 51 App. Div. 420; aff'g, 30 Misc. Rep. 354, 63 N. Y. Supp. 726.

Pleading statute of limitations by guardian.

A guardian sixteen years after his ward became of age was cited to account and pleaded the Statute of Limitations — *held*, that as long as he had property of the late ward in his hands unaccounted for he was liable to account. *Matter of Camp*, 126 N. Y. 377, 18 App. Div. 110.

The guardian should render and settle his account as soon as his ward arrives at age; and where he fails to do so, if he has property in his hands at the time belonging to the ward, he can not plead the Statute of Limitations against an accounting. *Matter of Sack*, 70 App. Div. 401, 75 N. Y. Supp. 120; distinguished in 80 App. Div. 495, 81 N. Y. Supp. 140.

¶ 372 What Defenses Recognized.

Where the will gave the widow the use of all the estate during her life, and did not dispose of the remainder, it was *held*, that there was no absolute gift of the fee to the widow, and she could be required to account. *Carpenter v. Carpenter*, 2 Dem. 534.

Where a husband gives his widow the use of all his estate during life, and then to such of his children as may be living at her death, no accounting can be required during the life of the widow for the purpose of having a division of the estate. *Carmichael v. Carmichael*, 4 Keyes, 346.

Where a New York administrator was appointed and also a Connecticut administrator, an accounting must be had in the New York court, and such an accounting will not be denied on the ground that a full accounting for all property in New York State has been had in Connecticut. *Reilley v. Duffy*, 4 Dem. 366, 3 Civ. Pro. 229.

Where there is a dispute as to whether the claim has been presented and allowed, or rejected, the surrogate may determine that question, but not the validity of the claim. *Matter of Reinach*, 41 Misc. Rep. 78, 83 N. Y. Supp. 651.

An order should be made directing an accounting, unless good cause is shown. The order rests in the sound discretion of the surrogate. *Matter of Blum*, 83 App. Div. 161, 82 N. Y. Supp. 491.

An order for accounting will be made where a judgment debt is presented four years after appointment and where the estate has practically been distributed, if no advertisement for creditors has been made or no reasonable effort made to ascertain creditors. *Matter of Blum*, 83 App. Div. 161, 82 N. Y. Supp. 491.

Where the creditor's judgment is on appeal the surrogate may refuse to order an accounting. *Matter of Merritt*, 35 App. Div. 337, 54 N. Y. Supp. 955.

Estate distributed.

Where an estate has been distributed so far as the free assets are concerned and the undistributed assets cannot be distributed or realized upon without great loss to the estate, the surrogate will be upheld in exercising his discretion not to order an accounting. *Matter of Withers*, 23 App. Div. 404, 48 N. Y. Supp. 169.

Where a judicial settlement has been had and the petition does not allege that new assets have been received, and the answer which alleges that all assets received have been accounted for is not denied, an accounting will not be ordered. *Matter of Jenkins*, 132 App. Div. 339, 117 N. Y. Supp. 74; *Matter of Hood*, 90 N. Y. 512; *Matter of Sautter*, 105 id. 514.

¶ 373 Effect of Release Pleaded as a Bar.

Consult section 2510, Code Civ. Pro., ¶ 14. Prior to the amendment of section 2472-a, by which the surrogate was given

jurisdiction to determine in certain cases the validity of a release or assignment of a legacy, some trouble was experienced in drawing the line between deciding and not deciding as to the validity of such a paper when it was repudiated by an allegation of fraud.

But now the surrogate is given jurisdiction to determine all questions of that character and should do so before deciding the main question at issue. *Matter of Dollard*, 74 Misc. Rep. 312, 133 N. Y. Supp. 1107; aff'd, 149 App. Div. 926, 133 N. Y. Supp. 1118.

An accounting cannot be required upon petition of one executor against another, each being also legatee, where they have executed a paper, stating that their accounts were settled as between themselves and as between themselves and said estate. Such release was not disputed. *Matter of Pruyn*, 141 N. Y. 544; aff'g, 76 Hun, 128, 27 N. Y. Supp. 572, 57 N. Y. St. Repr. 296.

On an accounting it was claimed that certain persons had no interest in the estate as they had given releases for their interests more than fifteen years previous and also some had executed assignments.

The surrogate in effect determined that such persons had no interest and proceeded with the accounting. The court, on appeal, affirmed the surrogate, holding that as appellants were not interested in the estate the court was not called upon to determine the other questions raised. *Matter of Hodgman*, 11 App. Div. 344, 42 N. Y. Supp. 1004; aff'd, 161 N. Y. 627.

The liability of an executor to account to a legatee is not discharged by her written receipt of a nominal sum in full of all demands where no accounting or settlement was had. *Harris v. Ely*, 25 N. Y. 138.

Where a voluntary settlement and distribution has taken place upon agreement with all parties, such settlement will not be disturbed after eight years. *Matter of Barrett*, 58 App. Div. 45, 68 N. Y. Supp. 589.

The Surrogate's Court has not been given equity jurisdiction to set aside assignments of claims for fraud or mistake (*Matter of Randall*, 152 N. Y. 508), but this rule has no application to settlements made by the executors in administering the estate. The Surrogate's Court is authorized to pass upon the accounts of the executors, and this authority necessarily confers jurisdiction to pass upon every item of disbursements for which the executors claim they should be allowed.

Judicial settlement by administrator. He had obtained the execution of papers by several next of kin releasing him and also assigning to him their respective shares in the estate. On the hearing the validity and effect of these papers were disputed by the persons alleged to have executed them. The surrogate disregarded the papers — an injunction restraining the settlement was refused. *Wright v. Fleming*, 76 N. Y. 517.

Transfers of interests in estates must be recorded.

Assignments of interests in estates have no effect except as between the parties unless recorded in the surrogate's office. *Matter of Losee*, 119 App. Div. 107, 94 N. Y. Supp. 1082.

Requirement for recording is found in section 32 of the Personal Property Law and in section 274 of the Real Property Law. See ¶ 33.

¶ 374 Application for Supplemental Citation to Bring in Other Interested Parties.

The proceeding is in the first instance one between the petitioner and the representative only, and the bringing in of other parties is not required.

If the petitioner should elect to apply for a supplemental citation to bring in new parties, his application could only be granted on it being made to appear from the account filed or otherwise, "that there is a surplus distributable to creditors or persons interested," and then only in the wise discretion of the surrogate.

Where a supplemental citation has not been issued, the admin-

istrator and his sureties cannot question the validity of the decree as against them. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93; rev'g, 20 Misc. Rep. 305, 45 N. Y. Supp. 663.

The provision of section 2729, Code Civ. Pro., as to citing sureties does not apply to a compulsory accounting and they are bound by the decree made. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93; *Matter of Storm*, 84 App. Div. 552, 82 N. Y. Supp. 731.

Since the extension of the general powers of the Surrogate's Court, a person holding an assignment of an interest in an estate, or in any other way interested in the accounting, should be made a party. See *Brown, as Trustee v. Robinson, as Trustee*, 137 App. Div. 939; also ¶ 76.

¶ 375 The Hearing.

Burden of proof.

A creditor calling an executor to account in case where no inventory has been filed, and where the account filed denies having received any assets, has the burden of showing the existence of assets. *Matter of Palmer*, 3 Dem. 129.

When proceeding may be maintained.

Although a representative has paid out the money of an estate to creditors filing their claims pursuant to notice, he can still be required to account at the instance of an alleged creditor who files his claim thereafter. *Matter of Gill*, 183 N. Y. 347; rev'g, 101 App. Div. 607.

An administrator *cum testamento annexo* may be required to account under this section. *Matter of Burling*, 5 Dem. 47.

Where one executor qualified and died, and another then qualified, the account of the latter cannot be required to be settled until one year after grant of letters to him. Section 2562, Code Civ. Pro., has no application to such a case. *Matter of Crowley*, 33 Misc. Rep. 624, 68 N. Y. Supp. 939; *Matter of Menck*, 5 N. Y. St. Repr. 341.

This proceeding can be maintained for the two-fold purpose of requiring an accounting as to personal estate and the proceeds of the sale of real estate to pay debts. *Matter of Sargent (Bradley)*, 42 App. Div. 301, 59 N. Y. Supp. 105; aff'g, 25 Misc. Rep. 261, 54 N. Y. Supp. 555.

The issues.

The issues between the original parties to this proceeding when tried do not bind any other parties interested in the estate, and a distribution of the fund cannot be directed until all parties interested have been duly cited and have been afforded an opportunity to be heard. *Matter of Rainforth*, 37 Misc. Rep. 661, 76 N. Y. Supp. 314.

Appointment of special guardian where application is by infant.

Upon the return of a citation where an application has been made upon behalf of an infant, if the representative makes petition for a voluntary accounting, no action is required upon the application for a compulsory accounting and no special guardian for the infant need be appointed.

If the representative upon the return of the citation does not file a petition for a voluntary settlement, but disputes the right of the applicant to have the order for a compulsory accounting, a special guardian should then be appointed for the infant.

If no opposition is made by the representative an order for an accounting may be made without the appointment of a special guardian for the infant, but one must be appointed when the proceeding comes on for hearing. *Matter of Wood*, 5 Dem. 345, 7 N. Y. St. Repr. 721.

¶ 376 The Decree.

It is error to make an order in the proceeding to pay a claim which the representative then disputes, on the ground that the claim has been admitted by failure to reject it. *Matter of Clauss*, 16 App. Div. 34, 44 N. Y. Supp. 805.

Where a claim has not been rejected or admitted, the decree may recite that fact and so leave the claimant free to prosecute

his claim in any manner provided by law. *Matter of Von Der Lieth's Estate*, 25 Misc. Rep. 255, 55 N. Y. Supp. 428.

Where an answer is filed alleging a defense and a trial is had upon the merits of such defense the surrogate should make findings of fact and law. *Matter of O'Brien*, 45 Hun, 281, 10 N. Y. St. Repr. 414.

A devise of land with power of sale for the benefit of the devisee is not a conversion of real estate into personalty so as to make such proceeds liable to pay debts, and on the accounting such fund should be treated as real estate. *Matter of McComb*, 117 N. Y. 378.

Decree may be made without further citation where petitioning creditor files no objection.

Where an executor or administrator is required to "render and settle his account" in proceedings for a compulsory accounting under sections 2726 and 2727 of the Code of Civil Procedure, the proceeding is confined to the original parties until it is made to appear "that there is a surplus distributable to creditors or persons interested," and until the surrogate has issued a supplemental citation. If the account, as filed, is not objected to by the petitioning creditor, it is the common practice, established by many precedents, to close the proceeding by an order declaring the accounts accordingly. *Matter of Sogaard*, 39 Misc. Rep. 519, 80 N. Y. Supp. 379.

Decree where trustee has been removed.

Where a trustee is removed, the decree upon his judicial settlement will ordinarily require him to turn over the estate in kind, if it is well invested and the successor trustee is willing to accept the same. Before the revision of 1914 there was no alternative to making a decree for the payment of money only if the securities were of such a character as the successor would not receive. This condition of the law was shown in an opinion by Surrogate Ketcham of Brooklyn in *Matter of Boyer* (68 Misc. Rep. 6, 124 N. Y. Supp. 892), in which he said. "The decree to be entered upon the accounting of a deposed trustee must sound in money

only. It must contain 'a summary of the account as settled.' Code Civ. Pro., § 2551. Unless by special convention, the direction must be that the fund be turned over to the successor in money and not in kind. No substituted trustee can be asked to take as cash securities which he neither selected nor approved.

"If the accounting trustee has investments of the fund which his successor will not accept, he is equitably entitled to the personal ownership of the rejected securities.

"While a keen regard for the safety of the trust would suggest that, in some cases, bad securities might be better than nothing and that they might well be held by the substituted trustee until the decree for payment was fulfilled, there seems to be no warrant for such an arrangement. It is held that the removed trustee is entitled to a clear title to the doubtful assets, either before or at the time of the decree requiring payment from him of the fund in cash.

"In this regard, it is said: 'He should have them' (all the assets for which he is refused credit) 'if for no other reason, in order to fulfill the requirements of the decree' (*Matter of Niles*, 113 N. Y. 547, 554), and again, 'As the executor is required to pay cash to the estate he becomes the equitable owner of the bonds and mortgages in which he has invested the proceeds of the estate, and it may very well be that unless he can make use of these bonds and mortgages he will be without funds to comply with the decree and, therefore, being unable to make compliance may be punished for contempt.' *Matter of Ryer*, 94 App. Div. 449, 451."

This decision led Surrogate Ketcham to suggest that there be some way to enable the surrogate to preserve at least part of the estate by directing the deposit of securities, even though they were of doubtful value, so that they might be sold and the proceeds applied on the decree, rather than to have a money decree against an insolvent trustee, who had the chance to make away with what remained of the estate. This situation led to the power given the surrogate by sections 2734, 2737 under which he may protect the estate at least to the value of the securities on hand. See ¶¶ 110, 368.

¶ 377 Warrant of Attachment.

Warrant of attachment may be issued for failure to obey an order to file an account without personal service of the order. *Matter of Callahan*, 66 Hun, 118, 49 N. Y. St. Repr. 425, 20 N. Y. Supp. 824; app. dism., 139 N. Y. 51.

For failure to pay money.

An order having been made directing the representative to make a payment, and he having notice of the order, it is not necessary to obtain a preliminary order to show cause why an attachment should not issue, but the warrant may be issued at once upon proof of default. *Guion v. Underhill*, 1 Dem. 302.

Representative may be relieved from contempt under a decree by showing his insolvency.

Where the decree orders the representative to pay over funds or turn over property and he is unable to comply with the decree he may be relieved by proving his insolvency. While proof of such insolvency will not justify the surrogate in refusing to make the decree against him, it may be taken into consideration in relieving him from contempt for failure to obey the decree.

The burden is upon the representative to make such positive proof. *Matter of Strong*, 111 App. Div. 281; aff'd, 186 N. Y. 584; *Matter of Griffith*, 49 Misc. Rep. 405, 110 N. Y. Supp. 215.

When surrogate may release person imprisoned for contempt.

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made as prescribed in section 2457 of the code of civil procedure, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

§ 775, Judiciary Law.

This section applies to a surrogate, and where a person has been imprisoned because of contempt and makes proof of his inability to pay he may be discharged. *Matter of Strong*, 111 App. Div. 281; aff'd, 186 N. Y. 584.

CHAPTER LI.

Voluntary Judicial Settlement of Accounts of Executors, Administrators, Guardians and Testamentary Trustees.

- ¶ 378. § 2729. When voluntary settlement may be had.
 § 2730. Citation.
 Settlement by trustee.
- ¶ 379. Issue and service of citation.
- ¶ 380. Intervening by person not cited.
- ¶ 381. § 2731. Proceedings on return of citation.
 § 2732. Affidavit to account.
- ¶ 382. Examination of accounting party.
- ¶ 383. Filing objections to the account.
- ¶ 384. Hearing on judicial settlement.
- ¶ 385. Standard by which acts should be judged.
- ¶ 386. Burden of proof of payment of debt.
- ¶ 387. Burden of proof of payment of expenses.
- ¶ 388. § 1832. When inventory may be contradicted.

¶ 378 Voluntary Final Judicial Settlement.

A final accounting is not necessarily the last to be made. Final accountings may be had from time to time whenever there is anything to account for. *Glover v. Holley*, 2 Bradf. 291; *Matter of Hood*, 27 Hun, 579. See ¶ 475.

The representative should make every effort to be prepared to institute a voluntary judicial settlement immediately after the expiration of publication of notice to creditors and in many cases the estate is then ready for settlement. It is the fault of too many executors and administrators that they do not recognize the entirely proper feeling of those interested in the estate that, under ordinary circumstances, they are entitled to receive their share of the estate at the earliest possible date.

Too many representatives make no serious move to settle the estate until toward the close of the expiration of a year, and then they find that such matters take time and before the estate is in a condition to be settled a long time thereafter has elapsed.

Account should be filed with petition.

When the petition for judicial settlement is filed, the account properly verified should also be filed, so that any person interested may examine it before the return day of the citation.

Voluntary judicial settlement.

In either of the following cases an administrator, executor, guardian or testamentary trustee may present to the surrogate's court his account and a petition praying that his account may be judicially settled and that all necessary and proper parties may be cited to show cause why such settlement should not be had:

1. By an executor or administrator,
 - a. Where the time for presentation of claims as fixed by a notice duly published has expired; or one year has expired since letters were issued to him or his predecessor in office.
 - b. Where letters issued to the petitioner have been revoked.
2. By a guardian,
 - a. Where a petition for a compulsory judicial settlement of his accounts may be presented by any other person.
 - b. Where he has properly used and expended all of the estate of the infant, and the circumstances are such that, in the discretion of the surrogate, it is proper that such guardian should be discharged.
3. By a testamentary trustee,
 - a. Where one or more distinct and separate trusts created by the will, have been, or are ready to be, fully executed.

§ 2729, Code Civ. Pro.

Effect of revision. New section.

This section combines parts of sections 2728, 2810, 2849 and applies to guardians and testamentary trustees.

A radical change is in subdivision "a" of paragraph one under which either an executor or administrator may have a final judicial settlement at the expiration of the time in which claims are to be presented. This enables a more prompt settlement of the estates of testators. If no notice to creditors is published, the settlement may be had at the end of a year from the grant of letters.

Another important addition is in subdivision "b" of paragraph two under which a guardian may have a final judicial settlement before the coming of age of the ward, where the fund

has been consumed, and the circumstances are such that the surrogate has good reason to believe that the infant no longer needs a guardian either of his person or property. Heretofore when the fund was expended, the guardian was compelled to wait for many years, sometimes, before he could be discharged from his financial liability.

Voluntary judicial settlement; citation.

Upon a voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee there must be cited:

1. All creditors or persons claiming to be creditors of the decedent, except such as by vouchers filed with the account appear to have been paid.

2. The sureties on his official bond, if any.

3. All co-executors, administrators, guardians or trustees who do not join in the petition.

4. The successor, if a successor has been appointed, in a case where the petitioner's letters have been revoked, or he has been removed, and if no successor has been appointed, all the persons interested who are required to be cited by this section.

5. The attorney-general in all cases where the decedent, ward or beneficiary died intestate as to any part of the estate or fund leaving no known heir-at-law or next of kin.

6. The widow or husband, if any, and all the heirs-at-law where the decedent, ward or beneficiary died intestate as to any real property, and all his next of kin where he died intestate as to any personal property.

7. All devisees, all trustees of any trust created by the will, and all legatees, except such as by voucher and release acknowledged, or proved, and duly certified and filed, appear to have been fully paid.

8. In the case of a guardian, there shall also be cited all persons who might have presented a petition for a compulsory settlement.

9. In the case of a trustee there shall also be cited all persons who are entitled, absolutely or contingently, by the terms of the will or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner as a part of his trust.

Where any person required to be cited has died, his executor or administrator shall be cited, and if no legal representative has been appointed, the husband or widow and all the heirs-at-law or next of kin, or both, of such deceased person, who are interested.

§ 2730, Code Civ. Pro.

Effect of revision. New section.

This section consists of part of section 2728 rewritten and sections 2810, 2811, 2849, 2850, combined with it making it apply to all guardians and testamentary trustees.

Subdivision 7 puts legatees in the same class with creditors who need not be cited providing an acknowledged voucher and release of the legacy is filed with the account.

Voluntary judicial settlement by trustee.

Former sections 2810, 2811 have been included in sections 2723, 2729, and those sections have been repealed.

Section 2742 applies to this proceeding as to the effect of a judicial settlement. *Matter of Valentine*, 1 Misc. Rep. 491, 23 N. Y. Supp. 289.

Who shall be cited.

Where a beneficiary dies, his representative is a necessary party to an accounting. *Matter of Smith*, 68 Hun, 530, 52 N. Y. St. Repr. 772.

A trustee who has notice of an assignment of a legacy is put upon inquiry before payment to the legatee, even though the assignment has never been filed with the trustee, and such person should be cited on the accounting. *Seger v. Farmers' L. & T. Co.*, 103 App. Div. 39, 112 id. 911, 187 N. Y. 314.

Right to intervene. See ¶¶ 46, 380.

Any interested person has the same right to apply to make himself a party that a person has on the judicial settlement by an executor or administrator.

A person wishing to intervene who is not authorized to do so has no right to make any motion in the case prior to the "hearing." *Matter of Wood*, 5 Dem. 345, 7 N. Y. St. Repr. 721.

Foreign testator; resident trustee.

Where a trust was created by a testator residing in another state, but the trust had been administered for many years by a resident trustee, the will having been proved here, the trustee was allowed to account and distribute under a decree of our courts, and the estate was not sent to the courts of the domicile for distribution. *U. S. Trust Co. v. Wood*, 146 App. Div. 751, 131 N. Y. Supp. 427; aff'd, 205 N. Y. 564.

¶ 379 Issue and Service of Citation.

Nonresident aliens. See also ¶¶ 84, 458.

It is being commonly held by the various Surrogates' Courts that nonresident aliens need not be served with citations, if the consul of the nation of which they are subjects appears in their behalf.

On settlement of the accounts of a public administrator the next of kin in Italy need not be cited if the Italian consul appears, and any balance may be paid to such consul. *Matter of Davenport*, 43 Misc. Rep. 573, 89 N. Y. Supp. 537.

The Italian consul has the right to represent an alien minor next of kin, and another person should not be appointed special guardian. *Matter of Bristow*, 63 Misc. Rep. 637, 118 N. Y. Supp. 686.

The Consul-General of Austria-Hungary under the Most Favored Nation clause of the Consular Convention with that Government, is also entitled to the benefits of the treaties with Italy and the other Most Favored Nations, including that with Peru, and he, too, has the right to appear for and represent alien next of kin residing in Austria-Hungary in all proceedings, to receive moneys due them and to do all things to further and protect their interests.

A decision directly affecting the Consul-General of Austria-Hungary is that rendered by Surrogate Cohalan of New York county on July 30, 1909, appearing in the New York Law Journal on July 31, 1909, *in re Alexander Nagy*, wherein it was held as follows:

"The Consul-General of Austria-Hungary, by virtue of the requirements of the treaty between that country and the United States, which secures him all the prerogatives and privileges granted to the functionaries of the same class of the Most Favored Nation, is entitled to represent and appear for all non-resident alien next of kin of intestate, who are citizens or subjects of Austria-Hungary."

In this matter there were several infant next of kin residing in Hungary for whom the Consul-General appeared on the accounting and upon whom he waived the issue and service of citation and whose shares were in the final decree directed to be paid to him, without security and without any power of attorney from anyone.

The ruling *In re Alexander Nagy* has since been followed in several accounting proceedings wherein the Consul-General appeared.

Issuing and serving citation.

What has been heretofore said (¶¶ 26-28) regarding the issuing and service of a citation applies to this and all proceedings, where jurisdiction of the person of interested parties must be obtained.

To sureties.

Particular care should be taken to cite the sureties on any official bond given by the accounting party, or their representatives if any have died. It was held in *Cookman v. Stoddard*, 132 App. Div. 485, 116 N. Y. Supp. 901, that if a surety was not cited, no action could be maintained against him upon the bond. Such cases as *Matter of Bodine*, 119 App. Div. 493, 104 N. Y. Supp. 138, were decided under the law as it stood before 1894 when the amendment was made which required the citing of all sureties.

Former sureties who have been released upon giving of new bond should be cited and may file objections. *Matter of Sill*, 41 Misc. Rep. 270, 84 N. Y. Supp. 213.

To trust company.

The surrogate should make a trust company with which money has been deposited by a temporary administrator a party to that administrator's accounting. *Matter of Rothschild*, 109 App. Div. 546, 96 N. Y. Supp. 372.

To illegitimate.

An illegitimate next of kin need not be cited. *Matter of Losee*, 119 App. Div. 107, 94 N. Y. Supp. 1082.

To judgment creditors.

Where the executor is accounting for proceeds of real estate sold, it is not necessary to cite judgment creditors of a person entitled to the fund derived from the sale. Their lien follows the fund into whosoever hand it goes. *Sayles v. Best*, 140 N. Y. 368; aff'g, 49 N. Y. St. Repr. 460, 20 N. Y. Supp. 951.

To creditors.

The citation need not be addressed to creditors whose vouchers have been filed. The fact that under the revision it is not made compulsory to file vouchers, must not lead the practitioner to think he is thereby relieved from citing such creditors. That rule applies only to the method of proof of the charge represented by the voucher. All creditors must be cited for whose claims vouchers are not filed.

To legatees.

Heretofore it has been necessary to cite all legatees even though their legacies have been paid. Now if a duly acknowledged and certified voucher and release has been filed with the account, such legatee need not be cited.

To assignee of interest.

Where a distributive share has been assigned both assignor and assignee should be cited, but not alleged creditors of the distributee who wish to attack the assignment. *Duncan v. Guest*, 5 Redf. 440; *Gibbons v. Shepard*, 2 Dem. 247; *Matter of Redfield*, 71 Hun, 344, 55 N. Y. St. Repr. 19, 25 N. Y. Supp. 3.

Legatees and next of kin must be cited, even though they have assigned their interests to strangers. *Matter of Wood*, 38 Misc. Rep. 64, 76 N. Y. Supp. 967.

A person who holds an assignment of the interest of an executor in his commissions before such commissions are earned and fixed is not a "person interested," required to be cited on judicial settlement. *Matter of Worthington*, 51 N. Y. St. Repr. 555; aff'd, 141 N. Y. 9.

Citation Where Party Interested Has Died.

Death of legatee or distributee; no legal representative appointed.

It is provided that if a legatee or distributee be dead, his executor or administrator may be cited (§ 2730). It is not required that citation issue to his next of kin, if there be a legal representative. Such next of kin might have no interest in the original estate, except through the deceased legatee or distributee. But it would seem that such interest ought to be represented upon the settlement and that for such purpose the next of kin ought to be brought in, where no representative has been appointed.

Effect of making representative a party.

While in an ordinary case making the personal representative of a deceased legatee a party to an accounting will bind the parties interested in the estate he represents, yet in cases where such representative is also the accounting party, equity requires the citing of all the parties themselves. *Fisher v. Banta*, 66 N. Y. 468.

The estate of a deceased next of kin should be represented on a judicial settlement by an administrator before decree is entered. *Wright v. Fleming*, 76 N. Y. 517.

¶ 380 Persons Claiming to be Interested in the Estate Who Have Not Been Made Parties May Ask to Intervene. See ¶ 46.

A creditor or person interested in the estate, although not cited, is entitled to appear on the hearing and thus make himself a party to the proceedings. §§ 2511, 2533.

Where a creditor so applies a sworn statement showing that he has a valid claim against the estate is sufficient to entitle him to be made a party. See § 2768, subd. 11.

Where the applicant claims the right to intervene as an heir-at-law or next of kin a sworn allegation of such interest is not sufficient to entitle him to intervene, if any party to the proceeding denies such interest.

In that case the surrogate proceeds to try as a preliminary issue the right of the applicant to be made a party.

Whether this trial is a special proceeding of itself or is a part of the proceedings upon judicial settlement has never been determined. This question assumes some importance when the form of the order or decree granting or denying the application is considered and when the defeated party desires to appeal therefrom. The correct theory would seem to be, that, inasmuch as the applicant is not a party to the judicial settlement his application to be made such party could not constitute any part of the proceeding for judicial settlement; but would be a special proceeding instituted by him against the executor or administrator representing all of the parties which special proceeding should result in a final order or decree as to the issue before the court. Such, however, does not seem to be the present practice. The application is considered to be a motion in the proceeding for judicial settlement and is heard upon the written affidavit or petition of the applicant, and such oral or written objections as the executor or administrator or any other party to the judicial settlement interposes.

The evidence of the parties is taken and the determination of the surrogate is shown by the entry of an order granting or denying the application.

An appeal from this order may be taken to the Appellate Division, but it is as yet undetermined whether an appeal will lie to the Court of Appeals.

When, however, the decree upon judicial settlement is made an appeal from such decree may be taken with the necessary statements, so that the granting or denying of such order may be reviewed in both the Appellate Division and the Court of Appeals.

There is some doubt, however, about the right to raise the question on the appeal from the decree, since in the *Matter of Nason*, decided by the Appellate Division as *Matter of Roche*, 119 App. Div. 927 (below, 53 Misc. Rep. 187, 104 N. Y. Supp.

601), an appeal from the decree was dismissed, which might indicate that the court thought there should have been an appeal from the order, and that the appeal from the decree raised no question.

Under the view that the application is a motion, it seems that the surrogate need not file a decision in writing or make findings of law and fact.

A person wishing to intervene who is not authorized to do so has no right to make any motion in the case prior to the "hearing." *Matter of Wood*, 5 Dem. 345, 7 N. Y. St. Repr. 721.

Right to intervene. See ¶ 46.

Where a person claims to be interested in an estate and asks to be made a party to the accounting, the surrogate should try that issue and determine whether the party should be allowed to intervene. *Matter of Thompson*, 41 Misc. Rep. 224; aff'd, 87 App. Div. 609, 83 N. Y. Supp. 983.

Where the claim of the applicant is *bona fide* and of great weight involving serious questions of fact, it is the better practice to allow the applicant to intervene so that such questions may be disposed of on the judicial settlement. *Matter of St. John*, 104 App. Div. 460, 93 N. Y. Supp. 836.

A mere allegation that a person is a creditor is sufficient to entitle him to be made a party to an accounting. *Matter of Miles*, 33 Misc. Rep. 147, 68 N. Y. Supp. 368; rev'd, 61 App. Div. 562; which was rev'd, 170 N. Y. 75.

The representative of a deceased person interested should be allowed to intervene. *Merritt v. Jackson*, 2 Dem. 214.

One claiming as assignee of an interest in the estate may intervene. *Gibbons v. Shepard*, 2 Dem. 247.

Where the accounting party is also the representative of another estate interested in the accounting, a legatee of the second estate is entitled to be a party and to file objections. *Matter of Walton*, 38 Misc. Rep. 723, 78 N. Y. Supp. 296.

¶ 381 Proceedings on Return of Citation.

On the return of a citation, issued as prescribed in the last section, the surrogate must take the account, and hear the allegations and proofs of the parties, respecting the same and make such order or decree as justice requires. The executor, administrator, guardian or trustee may be examined under oath by any party to the proceeding as to any matter relating to his administration of the estate or fund. If any party interested shall demand in writing that a voucher be produced and filed for any payment alleged by the account to have been made, the accounting party shall produce and file such voucher or make satisfactory proof of such payment.

§ 2731, Code Civ. Pro.

Effect of revision.

The requirement in former § 2729 that a voucher must be filed with the account for every payment set out in the account, has been omitted in rewriting these sections. The compulsory filing of vouchers has filled the vaults of the Surrogates' Courts with useless paper which there was heretofore no permission to destroy. Now by section 2488 (¶ 5) vouchers which are filed may be returned after two years, and destroyed after five years. The production of vouchers on the accounting is a valuable aid in adjusting and passing upon an account, and this section provides for their production and filing at the request of any person interested.

The unusual rules for making proof of payments which were contained in the former section have not been continued, and now payments may be proved by any competent and sufficient evidence.

Voucher may be impeached.

If an item of the account be objected to, the voucher may be assailed by the objector. He may show that the signature thereto is forged; that the amount it represents was not due to him who executed it; that it has not in fact been paid, or that only a portion of it has been paid. In short he may impeach the voucher. *Matter of Lloyd*, 39 N. Y. St. Repr. 851, 16 N. Y. Supp. 103.

Affidavit to account.

To each account filed in the surrogate's court, as prescribed in this article, must be appended the affidavit of the accounting party, to the effect that the

account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate or fund, and of all money and other property belonging to the estate or fund, which have come to his hands, or been received by any other person, by his order or authority, for his use, and that he does not know of any error or omission in the account, to the prejudice of any creditor of, or person interested in, the estate or fund.

From former § 2729.

§ 2732, Code Civ. Pro.

¶ 382 Examination of Accounting Party.

A full and complete examination of the accounting party may be had, even though no objections be filed. It is the right of any party interested to fully and thoroughly investigate all of the acts and the doings of the representative in connection with the management of the estate. The accounting party has been transacting business in behalf of all of those interested in the estate and he should court a most full and searching investigation into all his transactions. It is a mistaken notion that some representatives seem to have that it is an affront to their integrity and honesty to be required to submit to an examination by the parties interested. Such an examination will often satisfy all parties and obviate the necessity of filing objections to the account. Executors must never forget that their acts are subject to the closest and most rigid examination and that the only way to avoid the suspicion of dishonesty is to be able to show at any time each and every transaction accurately. *Matter of Stanton*, 41 Misc. Rep. 278, 84 N. Y. Supp. 46.

It is not necessary for a person interested to file objections before asking for an examination of the representative. *Geer v. Ransom*, 5 Redf. 578.

In adjusting the accounts of executors, the Surrogate's Court is governed by principles of equity as well as of law, and it is at all times competent for the executor, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and the amount for which he should be held liable. *Matter of Wagner* (119 N. Y. 28), where (at p. 31)

Judge Gray said: "The general jurisdiction conferred upon the Surrogate's Court, in matters relating to the conduct of executors and administrators, would seem meaningless, if not an absurdity, if it did not comprehend the right to decree intelligently, and upon equitable principles, and to order their conduct upon principles of justice and of reason. *Matter of Woodward*, 69 App. Div. 286, 292, 74 N. Y. Supp. 755.

Surrogate may examine accountant and the account.

The surrogate has the power on his own motion, with or without a petition or suggestion from any one, to require a judicial settlement of the accounts of an executor or administrator, and after obtaining jurisdiction of the person, to proceed and examine into the account and to settle and adjust the same.

In *Wigand v. Dejonge* (8 Abb. N. C. 260), it was held that the act of passing the account of an executor is a judicial act on the part of the surrogate, even when no objections are made to the account, and in doing so he exercises that power over trusts formerly exercised by the old Court of Chancery, and where infants are interested in the accounts he is bound to investigate and take charge of their interests as their ultimate guardian. *Matter of De Vany*, 147 App. Div. 494.

This general authority does not, however, make it necessary for the surrogate to make and maintain an objection which does not go to the legality of the acts of the executor, and which affects only an adult as to a matter which he might or might not wish to object to. In such case a default may be considered as a waiver of objection. See *Matter of De Vany* (205 N. Y. 591), which reversed the lower court, holding the principle laid down above.

Surrogate should not grant decree on default where acts of representative appear to have been illegal.

It is not the duty of the surrogate to approve an account which shows on its face to be illegal, simply because interested parties have made default in appearing and are not present with

objections. In *Matter of Broderick* (148 N. Y. Supp. 541), the action of a surrogate, who refused to grant a decree in accordance with the account which would have deprived a number of charitable institutions of their legacies, although none of them appeared on the return day, was approved. The surrogate of his own motion adjourned the hearing, and thereafter the legatees appeared and filed objections.

¶ 383 Filing Objections to the Account.

The account should be filed in the surrogate's office at the time the petition for judicial settlement is filed. This is a rule in most surrogates' offices, and the reason for the rule is, that as soon as a citation is served, a party interested ought to have an opportunity to examine the account, and, therefore, the account ought to be on file in the surrogate's office. Where there is an opportunity to examine the account before the return day of the citation, the delay necessary to examine the account is often obviated, and the parties, if they have objections to file, may be able to file such objections on the return day of the citation.

The objections should be in writing and verified, they should set forth plainly all causes of objection to the account, since the account and the objections constitute the issues to be tried. It is often the case that objections are indefinite, uncertain, and couched in general language, so that the real objections made are not clearly defined. This is poor practice, and ought not to be allowed, since it does not fully apprise the representative of clear and definite objections to the account, and consumes much time upon the hearing.

A party desiring to file objections may always have a preliminary examination of the accounting party to aid him in preparing his objections, and such an examination will always help to define the issues, and will sometimes obviate the necessity of filing objections.

Demanding trial by jury.

If after the preliminary examination any party desires to file objections and raise an issue, the trial of which he desires to have before a jury, he should demand such jury trial in the objections, specifying the particular issue which he desires to have so tried. Not all issues on a judicial settlement are proper issues for a jury, and the surrogate will determine whether or not to grant such trial.

Who may file objections.

Former sureties who have been released from subsequent defaults upon filing a new bond should be made parties and may file objections. *Matter of Sill*, 41 Misc. Rep. 270, 84 N. Y. Supp. 213.

A corepresentative cited may contest the account. *Mead v. Willoughby*, 4 Dem. 364.

Next of kin may attack the marriage of the surviving husband or wife to the deceased in Surrogate's Court. *Matter of Tabor*, 31 Misc. Rep. 579, 65 N. Y. Supp. 571.

Leave to file objections after the accounting has begun should be in most cases upon strict terms. *Matter of Turfler*, 78 Hun, 258, 61 N. Y. St. Repr. 283, 29 N. Y. Supp. 1151.

The objector is bound to set up any and all claims that he intends to urge against the accounting party. *Matter of Johnston (Hart)*, 60 Hun, 516, 39 N. Y. St. Repr. 521, 15 N. Y. Supp. 239.

The right to file objections may be lost by laches, and permission to file is in the discretion of the surrogate. *Matter of Jones (Von Glahan)*, 53 App. Div. 164, 65 N. Y. Supp. 865.

Special guardian.

It is the duty of a special guardian to file objections to an account against which there appears to be some objection, and to cause the rights of the infant interested to be determined. *Matter of Parr*, 45 Misc. Rep. 564; aff'd, 113 App. Div. 921, 100 N. Y. Supp. 1133.

Creditor of insolvent estate.

A creditor of an insolvent estate whose claim is valid may object to the proof or allowance of claims which are barred by the Statute of Limitations. *Matter of Kendrick*, 107 N. Y. 104; *Matter of Bork*, 55 Misc. Rep. 179, 106 N. Y. Supp. 361.

Prior consent to payment estops objector.

Where all parties have signed a consent that certain claims be paid and have released the representative on account of such payments, and the debts so paid seem to be fair and reasonable, such persons will be deemed to be estopped from questioning in any way the transactions covered thereby. If the parties desire to set aside such consent and release for fraud they must do so but where that is not done the surrogate may recognize such an agreement and give it force and effect. *Matter of Robinson*, 53 Misc. Rep. 171, 104 N. Y. Supp. 588.

¶ 384 Hearing on Judicial Settlement.

On the return of a citation issued as prescribed in this section the surrogate must take the account and hear the allegations and proofs of the parties, respecting the same.

From § 2731, Code Civ. Pro.

Reference of account and objections.

Under section 2536, Code Civ. Pro., a reference may be ordered where the estate or fund exceeds \$1,000 in value, or where the items to which objections are made exceed \$200. See ¶ 15.

The issues.

The account filed and the objections thereto constitute the pleadings and determine what issues may be tried and limit the examination to such issues. *Matter of Heuser*, 87 Hun, 262, 67 N. Y. St. Repr. 476, 33 N. Y. Supp. 831. *Matter of Woodward*, 69 App. Div. 286, 74 N. Y. Supp. 755; *Matter of Sloane*, 135 App. Div. 703, 119 N. Y. Supp. 667.

The issues may be tried on affidavits or oral testimony, but where there are important questions of fact the latter method is better.

Amendment of objections.

Permission granted to amend objections by setting up facts not known at the time objections were filed. *Matter of Burnett*, 15 N. Y. St. Repr. 116.

Defense of the Statute of Limitations. See ¶¶ 131, 370.

An executor making a voluntary accounting cannot plead the Statute of Limitations when a person cited seeks to charge him with assets not accounted for. *Wyckoff v. Van Siclen*, 3 Dem. 75; *Matter of Lyth*, 32 Misc. Rep. 608, 67 N. Y. Supp. 579.

The fact that an executor or administrator applies for a voluntary accounting does not deprive him of the right to set up the statute. *Matter of Van Wert*, 3 Misc. Rep. 563, 24 N. Y. Supp. 719.

When the claims of creditors are admitted and are valid at the time a petition and account are filed, the Statute of Limitations does not run against them if a citation be not issued upon such petition for nine years thereafter. *Matter of Hannon*, 46 Misc. Rep. 229, 93 N. Y. Supp. 207.

Decision.

After a trial of a question of law or of fact the surrogate should make and file his decision as required by section 2541, Code Civ. Pro., as a basis for the decree. See ¶ 33.

Account of guardian.

Where the same person is guardian for more than one infant, a separate account should be kept with each infant wherein such guardian should be charged with each infant's share of the income and credited with each infant's support and share of expenses. *Freeman v. Mohrman*, 1 Dem. 461.

A late infant filed objections to her guardian's account and being a nonresident asked for a commission to take her testimony

in her own behalf — *held* that the surrogate had power to issue such commission. *Matter of Plumb*, 135 N. Y. 661; *aff'g*, 64 Hun, 317.

The surrogate has the right to grant an allowance to the guardian for the expenses of the accounting. *Matter of Carman*, 21 N. Y. St. Repr. 254, 4 N. Y. Supp. 690.

A trust company which is guardian of an infant has right to employ agents for the collection of rents. *Garvey v. Owens*, 35 N. Y. St. Repr. 133, 12 N. Y. Supp. 349.

A prior account filed in the Surrogate's Court by the guardian may be received in evidence. *Matter of Camp*, 18 App. Div. 110, 45 N. Y. Supp. 600; *aff'd*, 161 N. Y. 651.

Attorneys' fees where action brought on behalf of infant.

Before allowing an item for attorney's fees in an action brought on behalf of the infant, where the fee was contingent, it should be ascertained that section 474 of the Judiciary Law has been complied with regarding the allowance of such fees.

Where the general guardian acted as attorney for the guardian *ad litem* in an action for the benefit of the infant, it was held that the fees should be settled by the court in which the action was brought. *Matter of Tyndall*, 117 App. Div. 294, 102 N. Y. Supp. 211. See Judiciary Law, § 474.

Money or property not received by virtue of office.

Insurance money on the life of the ward, premiums paid by guardian individually, does not belong to the ward's estate unless so written in the policy. *Matter of Wolfe*, 75 Misc. Rep. 454, 136 N. Y. Supp. 333.

¶ 385 Standard by Which Acts of the Representative Should be Judged.

In passing upon the acts of a representative after he has been required by his office to perform certain duties to the best of his ability, according to the facts known to him at that time, the surrogate will not judge the representative wholly by re-

sults or in the light of his present knowledge of what has happened. The law requires honest and competent service in behalf of the estate, but recognizes the limitations of the class of men and women who are called upon to act as business managers of estates. They should not be judged by the fuller knowledge which they possess upon the accounting but by the knowledge and facts which were accessible to them at the time they made the decision which they were required to make. *Matter of Watson*, 101 App. Div. 550, 92 N. Y. Supp. 195.

Effect of failure to duly administer.

When the representative departs from the course of due administration prescribed by law, he takes the risk of failure, and the burden rests upon him to show that the administration which he substituted for that prescribed by law has resulted equally as favorably to all persons interested as if he had made due administration. *Matter of Meagley*, 39 App. Div. 83, 56 N. Y. Supp. 503.

Representative must act with care and diligence, and should employ an attorney when necessary.

The executor is only required to bring to the discharge of his duties the intelligence which an ordinarily good business man would use in like matters; and where in the course of the administration of his trust he is confronted with any question which requires the advice of a skilled specialist and in good faith seeks such advice, receives the same, and acts thereon, he is not held accountable for the consequences of following it. And this is particularly true of intricate propositions of law. *Matter of Joost*, 50 Misc. Rep. 78, 82, 100 N. Y. Supp. 378.

Matter of Huntley (13 Misc. Rep. 375, 35 N. Y. Supp. 113), has well settled the rule to be that those necessary expenses for which an executor must be reimbursed are those which are contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. *Matter of Stanton*, 41 Misc. Rep. 278, 84 N. Y. Supp. 46.

Protection by advice of counsel.

Advice of counsel will not protect a representative from a charge of making unreasonable expenditures. *Matter of Huntley*, 13 Misc. Rep. 375, 69 N. Y. St. Repr. 487, 35 N. Y. Supp. 113.

Where a loss has occurred in the management of the estate, it is some defense to show that the representative has in good faith sought the advice of competent counsel from his lawyer or banker and that he acted thereupon. *Matter of Ball*, 55 App. Div. 284, 66 N. Y. Supp. 874.

¶ 386 Burden of Proof of Payment of Debt.

While it is no longer required that a voucher be produced and filed, unless required by a party (§ 2731, ¶ 381), the safer practice is to file a voucher for every payment. The voucher will make some *prima facie* proof of payment, and will greatly assist the representative in proving the payment, when he is an incompetent witness as to the validity of the debt or expense.

The accounting party is not bound to establish payments for which he presents vouchers unless they are denied by objections, and then the burden of impeaching such payments is on the objectors. *Boughton v. Flint*, 74 N. Y. 476; rev'g, 13 Hun, 206; *Matter of Frazer*, 92 N. Y. 239.

Where a voucher is not produced but is claimed to be lost, the burden is upon the executor or administrator to justify the payment. *Matter of Rowland*, 5 Dem. 216.

When assets are shown to have been received by the representative and the representative asks for a credit for payments, the burden rests upon him to show that the payments were actually and properly made. *Matter of Koch*, 33 Misc. Rep. 153, 68 N. Y. Supp. 375.

The fact that the claim is made by a near relative does not change the rule. *Valentine v. Valentine*, 4 Redf. 265.

The executor makes a *prima facie* case for allowing him credit for debts paid where he caused claims presented to be examined and learned that the persons presenting them had performed serv-

ices for the deceased. The executor is not bound to prove by evidence that would sustain a verdict against him if he had disputed the claim that the claim was due and payable. *Matter of Myers*, 36 App. Div. 625, 55 N. Y. Supp. 168; aff'd, 165 N. Y. 617.

Debts discharged in bankruptcy.

The burden is on the creditor to show that the discharge in bankruptcy did not release and discharge the debt. *Matter of Peterson*, 68 Misc. Rep. 10, 124 N. Y. Supp. 907.

Effect of allowance or payment of a debt.

The new rule as to the effect of the admission and allowance of a claim by the representative made in section 2680 materially affects the proof, where a claim is objected to on judicial settlement. See ¶ 220.

Incompetency of representative as a witness when payment of debt by executor or administrator is contested. See ¶ 431.

Where the representative has paid a debt and filed his voucher, and the payment is contested, the issue is between the representative and the objector, and although the representative may have personal knowledge of the contracting of the debt by the deceased, derived from personal conversation with the deceased, he cannot testify to such personal transaction.

The debt having been paid, the creditor is no longer a person interested, and he may be called by the representative to give testimony as to the validity of the debt so paid and his testimony will be competent.

An executor cannot testify to transaction with his testator in defending his account from attack by residuary legatees. *Matter of Gabriel*, 44 App. Div. 623, 60 N. Y. Supp. 87; aff'd, 161 N. Y. 644.

Nor when he has paid a debt, credit for which is contested, can he give evidence of conversations with the testator concerning the validity of that debt. *Matter of Smith*, 153 N. Y. 124; rev'g, 89 Hun, 606, 34 N. Y. Supp. 1057.

A creditor contesting an account cannot take the objection under section 829, Code Civ. Pro. *Matter of Brodhead*, 19 Misc. Rep. 373, 44 N. Y. Supp. 357.

A surety on a bond of administrator is an interested party. *Miller v. Montgomery*, 78 N. Y. 282.

While a representative cannot testify concerning payments for which he has no vouchers, yet if the contestants put him on the stand and examine him upon such matters they are bound by his testimony. *Rose v. Rose*, 6 Dem. 26.

¶ 387 Burden of Proof of Payment of Expenses of Administration. See ¶ 405.

It is a well-settled rule that where a payment is made by the executor for expense of administration and a voucher for the same is produced, showing upon its face the nature and character of the expenditure, and a reasonable statement of the facts rendering the same just and reasonable, a *prima facie* case for the executor is made out, and the burden of impeaching such expenditure is on the objector. If the charge be reasonable on its face and said to be necessarily contracted for the good and benefit of the estate, the presumption is that it is correct. *Matter of White*, 6 Dem. 375, 15 N. Y. St. Repr. 729; *Matter of Sprague*, 40 App. Div. 615, 57 N. Y. Supp. 1128; *aff'd*, 162 N. Y. 611.

The cases almost universally hold that the burden of proof of administration expenses is upon the representative. The foregoing case, *Matter of White*, apparently relaxes this rule, but that case only goes to the extent of holding that the representative may rely upon his vouchers and a full and complete statement of facts showing the justness and reasonableness of the charge as a *prima facie* case. If the representative takes this position, he must assume the responsibility that he has thus satisfied the surrogate without further proof.

¶ 388 When Inventory May be Contradicted.

In an action or special proceeding, to which an executor or administrator is a party, wherein the question, whether he has administered the estate of the decedent, or any part thereof, is in issue, or is the subject of inquiry, and the

inventory of assets, filed by him, is given in evidence, either party may rebut the same, by proof, either:

1. That any property was omitted in the inventory, or was not returned therein at its true value; or,

2. That any property has perished, or has been lost, without the fault of the executor or administrator; or has been fairly sold by him, at private or public sale, at a less price than the value so returned; or that, since the return of the inventory, it has deteriorated or enhanced in value.

§ 1832, Code Civ. Pro.

Effect of inventory.

Ordinarily the inventory is *prima facie* correct, and the burden of showing the contrary rests upon the contestant. *Matter of Van Sise*, 38 Misc. Rep. 155, 77 N. Y. Supp. 266; *Matter of Rogers*, 153 N. Y. 316; rev'g, 92 Hun, 609; *Matter of Mullan*, 145 N. Y. 98; aff'g, 74 Hun, 358, 26 N. Y. Supp. 683, 56 N. Y. St. Repr. 347.

An inventory wherein a note is set up as "not good" is *prima facie* evidence of such fact on an accounting. *Smith v. Collamer*, 2 Dem. 147.

An inventory made by the predecessor in office does not bind the successor even presumptively. *Solomons v. Kursheedt*, 3 Dem. 307.

Where an inventory as temporary administrator has been made and later one as executor, the latter controls in determining how much the executor should be charged with. *Matter of Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494.

Correcting inventory.

Where a mortgage owned by several persons had not been properly inventoried as to the amount of the interest of each person, the surrogate may correct such inventory and in doing so is not allowing a claim. *Matter of Hallenbeck*, 119 App. Div. 757.

Where appraisers had set off to the husband the money value of the articles named in section 2713 (now § 2670), Code Civ. Pro., the executor was held not to be bound by such illegal action of the appraisers. *Matter of Baird*, 126 App. Div. 439, 110 N. Y. Supp. 708.

CHAPTER LII.

Voluntary Judicial Settlement, Continued; with what Property the Accounting Party Should be Charged.

- ¶ 389. Generally with all property received.
- ¶ 390. With all property recognized as assets.
- ¶ 391. With property not inventoried.
- ¶ 392. With property in hands of the representative before death of deceased.
- ¶ 393. With profit and loss from personal dealings.
- ¶ 394. Retaining money to satisfy debt due deceased from legatee or distributee.
- ¶ 395. Rents and profits of land.
- ¶ 396. Proceeds of land sold under power of sale.
- ¶ 397. Personal property held by husband and wife jointly.
- ¶ 398. § 2733. Increase and decrease in value of property.
Losses by sale on credit and poor loans.
- ¶ 399. Loss through depreciation of real or personal estate.
- ¶ 400. Liability for uncollected debts and demands.
- ¶ 401. Liability for illegal debts or expenses paid.
- ¶ 402. Liability for interest.
- ¶ 403. Liability for waste.

¶ 389 With What Property the Representative Should be Charged.

The account of the representative, when properly made up, charges him with all the property mentioned in the inventory and all other property not mentioned therein which has come to his hands and which belonged to the deceased. It sometimes happens that property claimed by the representative to belong to the estate is claimed by other persons, and to settle those questions it may be necessary for him to resort to an action in the Supreme Court to determine the title to such property. In most instances such questions can be settled upon the judicial settlement under the more complete jurisdiction now given to Surrogates' Courts. So far as possible all these questions should be settled before the proceeding of judicial settlement is instituted. The various classes of prop-

erty which constitute assets to be accounted for are set forth in section 2672, Code Civ. Pro., paragraphs 195 to 204.

An executor must account for all of the assets of his testator's estate which are in his possession or under his control, and the jurisdiction of the court is sufficient to enable it to probe his transactions with any one and to adjudge that property acquired by him, either with or without the assertion of his authority as executor, is equitably assets in his hands for distribution. *Matter of Schaefer*, 34 Misc. Rep. 34, 69 N. Y. Supp. 489; mod'd, 65 App. Div. 378, 73 N. Y. Supp. 57; aff'd, 171 N. Y. 686; *Matter of Brintnall*, 40 Misc. Rep. 67, 81 N. Y. Supp. 250.

¶ 390 All Property Recognized as Assets Must be Accounted for.

All property which constitutes the assets of the estate, as specified in section 2672 (¶ 195), Code Civ. Pro., should be charged to the representative in his account or sufficient reason should be given why the same is not so charged. The representative is held to strict accountability for all of such property.

He must be active and diligent in obtaining possession of it and in caring for and preserving it.

In making a sale of it, he must obtain the best price he can get and must not dispose of it to any person for less than such best price through carelessness or favoritism.

Sale of stocks and securities. See ¶ 225.

When the estate contains stocks or other fluctuating securities, they must be sold as soon as their fair value can be obtained. The market for such securities should be watched and a sale promptly made upon a favorable market; if this is not done the representative may be charged with any loss occasioned thereby. In New York city such sales are made at a regular auction room, but in country counties they may be at public or private sale or through general brokers, it being necessary that the representative shall take the best means at his command to get a fair price.

Proceeds of real estate converted into personalty.

Where real estate is converted into personalty it passes to the representative to be distributed as personal estate and the same should be accounted for by him. See ¶ 203.

Property of deceased lunatic.

The representative should collect and be charged with the personal estate of a deceased lunatic remaining after an accounting by his committee in the proper court.

In some cases an incompetent's real estate becomes assets for the payment of debts. See ¶ 197.

Liability of a deceased committee of an adjudged lunatic for property in his hands and for his acts should be settled before the County or Supreme Court. *La Grange v. Merritt*, 96 App. Div. 61.

Estate of an adjudged incompetent where the incompetent or committee has died. See ¶ 368.

The proper method of ascertaining the condition of the estate of a lunatic whose committee has died is by an accounting in the proper court. *La Grange v. Merritt*, 96 App. Div. 61, 89 N. Y. Supp. 32.

Where a lunatic dies after appointment of committee, that committee should account to the proper officer and the estate should be administered and settled in Surrogate's Court by an executor or administrator. *Killick v. Monroe Co. S. B.*, 17 N. Y. St. Repr. 283, 1 N. Y. Supp. 501.

¶ 391 Charging Representative with New Assets.

In order to charge an executor with assets it is necessary to establish affirmatively, by a fair preponderance of evidence, that such assets came into possession of the representative. *Matter of Koch*, 33 Misc. Rep. 153, 68 N. Y. Supp. 375.

The affirmative of establishing more assets than are acknowledged by the inventory and account is with the party objecting,

and it must be established with reasonable certainty and not left to mere conjecture or suspicion. Question of charging an administratrix with an uncollected note. *Matter of Baker*, 42 App. Div. 370, 59 N. Y. Supp. 121; *Matter of Mullon*, 145 N. Y. 98; aff'g, 74 Hun, 358, 56 N. Y. St. Repr. 347, 26 N. Y. Supp. 683.

How and when an inventory may be contradicted or surcharged is discussed in paragraph 388.

Case where good-will of a school was not appraised and brought no additional sum on sale of furniture, etc. Executor held not liable for the value of such good will. *Gilman v. Wilber*, 1 Dem. 547; dist'g, 6 N. Y. 216. See also *Mertens v. Mertens*, 87 App. Div. 295, 84 N. Y. Supp. 352.

¶ 392 Liability for Money or Property in the Hands of the Executor Before Death of the Deceased. See ¶ 34.

Where the money or securities are received in such a way as to make the party a debtor to the deceased, he should be so charged, and the burden is upon such person to show that he had accounted to the deceased for such money or securities before his death.

The deceased had the right to require accounting before his death, and that accounting can be required by his representatives after his death. *Matter of Mitchell*, 36 App. Div. 542, 55 N. Y. Supp. 725; aff'd, 161 N. Y. 654.

An attorney drew the will of the deceased and was therein appointed executor. On the same day she gave him her bank-book with an order to draw the money. He at once drew the money, and the next day she died. The executor delayed offering the will for probate, and when he was forced to make probate he had spent most of the money for his own purposes except some small amounts paid for funeral expenses. It was held that the executor should be charged with the total amount received by him as money in his hands belonging to the estate. *Matter of Brintnall*, 40 Misc. Rep. 67, 81 N. Y. Supp. 250.

Charged with his own debt. See ¶ 197.

Where it is shown that a debt is due from the representative and that since his qualification he has been able to pay it, he should be charged with the amount thereof upon his settlement. *Keegan v. Smith*, 31 Misc. Rep. 651, 64 N. Y. Supp. 1117; which was rev'd, 33 Misc. Rep. 74; which was again rev'd, 60 App. Div. 168; and aff'd, 172 N. Y. 624.

A claim against the administrator should be included in the inventory, and if he be insolvent and unable to pay it, he may receive credit therefor on his final accounting. *Burkhalter v. Norton*, 3 Dem. 610; *Baucus v. Stover*, 89 N. Y. 1; *Matter of David*, 44 Misc. Rep. 337, 89 N. Y. Supp. 927.

The note of an insolvent executor must be held as assets since his commissions, when allowed, must be credited on the note. *Freeman v. Freeman*, 4 Redf. 211.

Where the debt is interest-bearing it includes the interest upon the same until the amount is actually paid over. *Matter of Davis*, 37 Misc. Rep. 326, 75 N. Y. Supp. 493.

Judgment obtained by the deceased against an administrator must be treated as money in his hands.

A judgment against an administrator held by the deceased cannot be questioned before the surrogate and must be charged against the administrator as so much money in his hands.

Where no effort has been made to show a failure of appropriate proceedings to collect such judgment, the surrogate on final accounting will not inquire into the solvency of the administrator to relieve him from responsibility. *Matter of Griffith*, 49 Misc. Rep. 405, 110 N. Y. Supp. 215.

The validity of a judgment obtained by the deceased against the person who afterward becomes the executor or administrator cannot be tried in Surrogate's Court. *McNulty v. Hurd*, 72 N. Y. 518; *Matter of Brown*, 35 Misc. Rep. 362.

Whether the representative is able to pay it or not should not be tried by the surrogate in the first instance, but he should

be charged with the amount of it so that all interested parties may have the benefit of such asset. *Baucus v. Stover*, 89 N. Y. 1; *Matter of Griffith*, 49 Misc. Rep. 405.

Statute of Limitations.

The representative cannot raise the Statute of Limitations in his own favor and thereby avoid paying to the estate his own debt due to it. He must charge himself with such debt and account for it as so much assets in his hands. *Matter of Timerson*, 39 Misc. Rep. 676, 80 N. Y. Supp. 639.

Rule that executor cannot have benefit of the Statute of Limitations where it has run at the date of death, questioned. 48 N. Y. Law Jour. 1478.

¶ 393 Profit and Loss Arising out of Personal Dealings with Estate. See ¶¶ 398, 413.

An executor who takes over stock of the estate, no objection being made to such improper purchase, is chargeable with the market value on the day of such purchase. *Barker v. Smith*, 1 Dem. 290.

Purchase by an executor of the business (livery) of the testator at inventory value, no effort to make a sale having been made, will be treated as void and illegal and a sale ordered. *Matter of Van Houten's Estate*, 18 Misc. Rep. 524, 42 N. Y. Supp. 1115; rev'd, 18 App. Div. 309, 45 N. Y. Supp. 836, on the point that the executor was not liable for profits of the business so purchased. See also 18 App. Div. 306; aff'd, 154 N. Y. 773.

The estate held a large block of stock in a corporation. The executors held small amounts and were officers therein. They voted themselves large amounts of compensation as such officers from profits — *held*, that they must account therefor, saying: "An executor must account for all the assets of his testator's estate which are in his possession or under his control, and the jurisdiction of the court is sufficient to enable us to probe his

transactions with any one, and to adjudge that property acquired by him, either with or without assertion of his authority as executor, is equitably assets in his hands for distribution." *Matter of Schaefer*, 34 Misc. Rep. 34, 69 N. Y. Supp. 489; aff'd, 65 App. Div. 378; aff'd, 171 N. Y. 686.

Where the residuary legatee, after paying all claims and legacies, takes over the business property of the deceased (an ice business), and conducts the business for five years and then sells out, he is not accountable to the estate for the proceeds of such sale. *Matter of Mullon*, 145 N. Y. 98; aff'g, 74 Hun, 358.

Money lost by investment of estate funds in business will be charged against the representatives. *Brinckerhoff v. Farias*, 52 App. Div. 256, 65 N. Y. Supp. 358; aff'd, 170 N. Y. 427.

An executor who previously had acted as agent for the deceased and who at her death had securities belonging to her in his hands must account for the same or show affirmatively that he had accounted to her in her lifetime. *Matter of Mitchell*, 36 App. Div. 542, 55 N. Y. Supp. 725; aff'd, 161 N. Y. 654.

Where an administrator assigned a mortgage to a third person, who at once assigned it to the administrator personally—*held*, such assignments were not void, but voidable only at the election of the next of kin. *Read v. Knell*, 143 N. Y. 484; aff'g, 69 Hun, 541, 53 N. Y. St. Repr. 342, 23 N. Y. Supp. 941.

The use of estate money in a business corporation, although wholly for the benefit of the estate, cannot affect the legal liability of the representative although it may his moral liability. *Matter of Hirsch*, 116 App. Div. 367, 101 N. Y. Supp. 893; aff'd, 188 N. Y. 584.

Use of estate funds in business of the representative.

The employment and use of estate moneys by executors, administrators, and trustees, during the continuance of the trust, has been from the earliest times the subject of frequent consideration by the courts, and their decisions have displayed a uniform

tendency toward that mode of use which should afford the greatest security to the fund. Their employment by such trustees in trade, or as loans to persons engaged in business or in the prosecution of mercantile, commercial, and manufacturing enterprises or speculative adventures, has been uniformly *devastavit* of the estate.

Trust funds so invested still remain impressed with the obligations of the trust in the hands of those persons having knowledge of the trust character and are subject to be reclaimed by suit. *Deobold v. Oppermann*, 111 N. Y. 531; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697; *Warren v. Union B. of R.*, 157 N. Y. 259.

Whoever receives property knowing it to be the subject of a trust and to have been transferred by the trustee in violation of his duty or power takes it subject to the right not only of the *cestui que trust*, but of the trustee to reclaim possession. *Zimmerman v. Kinkle*, 108 N. Y. 282; *Wetmore v. Porter*, 92 *id.* 76.

Paying less than full value for legacies.

The rule prohibiting an executor or other trustee from managing the affairs of the trust or dealing with the trust property so as to gain any advantage directly or indirectly for himself beyond his lawful compensation is well supported by the decisions of the courts of this State.

In *Matter of Schroeder*, No. 1 (113 App. Div. 217) the court said that this rule is most salutary. "Persons holding fiduciary positions in the many trust relations which modern society has produced, should be held to the strictest accountability. The community should be given to understand that the courts of this State will hold trustees to the highest standard of straight conduct, and will not permit them to make by virtue of their trusts a private and personal profit beyond the compensation allowed by law."

Any other rule would permit an executor to purchase lega-

cies bequeathed by his testator at a discount, and profit by paying himself in full. Such a practice would open the door to the greatest fraud. The only proper and safe rule to follow is to hold that an executor shall not make any profit by the discount of a legacy and, if he does, it shall inure to the benefit of the estate whether the legatee complains of unfair treatment or not. *Matter of DeVany*, 147 App. Div. 494.

This case was reversed by the Court of Appeals (205 N. Y. 591) in a short memorandum which seems to hold that where an adult legatee is the only person interested, and does not make an objection, the surrogate is not justified in surcharging the account.

Where an executor speculated in the claims against the estate, buying them at a discount and paying them to a dummy at face value, he will be charged with the profit. *Matter of Rainforth*, 40 Misc. Rep. 609, 83 N. Y. Supp. 57.

¶ 394 Representative Should Retain Money to Pay Debt Due to Intestate, Even Though the Statute Has Run Against It. See ¶ 216.

The rule of law is well settled that the administrators have a lien and a right of detention upon the distributive shares sufficient to pay the indebtedness to the estate, and it is the duty of the court to make a decree accordingly. The rule is based upon the theory that the Statute of Limitations does not raise a presumption of payment, but merely creates a bar to the remedy by action. As no presumption of payment arises from the lapse of time claims against distributees, are assets in the hands of the administrators, for which they must account. It is not a mere question of legal offset, but of equitable lien and right of retainer, and the right depends upon the principle that the distributee is not entitled to his distributive share while he retains in his own hands a part of the fund out of which that and other distributive shares ought to be paid. *Rogers v. Murdock*, 45

Hun, 30, 9 N. Y. St. Repr. 660; *Matter of Timerson*, 39 Misc. Rep. 676, 80 N. Y. Supp. 639.

Retention to satisfy partnership debts. See ¶ 202.

Where claims have been presented to the estate of a deceased partner arising out of the partnership business, and a judicial settlement is being had before the partnership business is settled, the surrogate should direct the executor to retain a sufficient sum to meet such demands, and make present distribution of the balance of the estate. *Hoyt v. Bonnett*, 50 N. Y. 538.

¶ 395 When Rents and Profits of Land Descending to Heirs Belong to the Executors.

Where by the will a bare power of sale is given to executors and the lands meanwhile descend to the heirs, the latter are at law entitled to the intermediate rents and profits, but if the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, then in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund, and the heirs may be compelled to account therefor to the executor. *Stagg v. Jackson*, 1 N. Y. 206; *Moncrief v. Ross*, 50 id. 431; *Lent v. Howard*, 89 id. 169.

Where there is an imperative power of sale which converts real into personal estate, rents received pending sale are personal property and should be accounted for as such by the executor. *Ingrem v. Mackey*, 5 Redf. 357.

Where real estate is devised to executors with power of sale, rents received are assets applicable to payment of debts. *Glacius v. Fogel*, 88 N. Y. 434.

When rents should not be included in account.

When an executor has only a naked power concerning real estate, his account does not properly contain items of receipts and disbursements connected with the real estate. *Matter of Johnson*, 32 App. Div. 634, 52 N. Y. Supp. 1081.

Rents from devised real estate should not be collected by exec-

utor and are not applicable to the payment of legacies. *Matter of McKay's Est.*, 33 Misc. Rep. 520, 68 N. Y. Supp. 925.

An executor who intermeddles with the real estate and assumes the management thereof without authority has no right to compensation, even for valuable services as such. *Myers v. Bolton*, 157 N. Y. 393; mod'g, 89 Hun, 342, 70 N. Y. St. Repr. 198, 35 N. Y. Supp. 577.

Property that descends to heirs of an intestate or passes under the will of a testator to a devisee does not go to executor or administrator, and if he assumes possession of it and collects the rents the remedy of the persons entitled to it is by a proper action at law. A surrogate has no jurisdiction to determine controversies arising from such matters. *Matter of Spears*, 89 Hun, 49, 69 N. Y. St. Repr. 428, 35 N. Y. Supp. 35; aff'g, 10 Misc. Rep. 635; *Matter of Blow*, 32 N. Y. St. Repr. 290, 11 N. Y. Supp. 193; *Matter of Foulds*, 35 Misc. Rep. 171, 71 N. Y. Supp. 473.

Where an executor takes no estate in real property under a will, but collects rents from such real estate, he does not collect them as executor and the Surrogate Court will not settle his account concerning them. *Terry v. Bale*, 1 Dem. 452.

An administrator has no duty to perform with regard to the real estate of the deceased and can purchase the property at foreclosure sale. *Hollingsworth v. Spaulding*, 54 N. Y. 636.

An executor or administrator has nothing to do with anything save the mere personal assets of the testator or intestate unless additional authority be given in and by the will, except that either may apply to the court for leave to sell the real estate for the payment of the debts. *Dunning v. Ocean N. B.*, 61 N. Y. 497; aff'g, 6 Lans. 298.

Taxes on real estate owned by heirs or devisees, if paid by the executor or administrator, constitute a personal transaction between the parties and have no place in the account. *Matter of Selleck*, 111 N. Y. 284.

Collection of rents under authority of court.

Where it is necessary to apply the real property to the payment of debts a representative may apply to the court for authority

to enter into possession of the real property and collect the rents for the benefit of the creditors and the persons ultimately entitled thereto. See § 2701, ¶ 245.

These rents should not be treated as personal property, but as real estate, and should be included in the account under a separate schedule, referring to the authority by which they were collected, and stating that they are held subject to the order of the court on judicial settlement.

Rents from real estate bid in on foreclosure of mortgage held by deceased.

Real estate bid in under foreclosure being considered as remaining personal estate, all rents collected from the same should be treated as income of personal estate and should be accounted for as such. See ¶ 203.

Title by devise carries accruing rents.

Rent accruing after the owner's death goes to the heir or devisee, and there cannot be set off against such rent damages accruing under a contract with the deceased owner. *Jay v. Kirkpatrick*, 26 Misc. Rep. 550, 57 N. Y. Supp. 476.

Devisee rejecting devise.

In cases where a devisee refuses to accept a devise, the executor may be obliged to act as a trustee for collection of the rents and making proper application of them under the terms of the will.

¶ 396 May be Charged With Proceeds of Land Sold Under a Power. See ¶ 203.

An executor may account for the proceeds of real estate sold under a power of sale contained in a will, and the surrogate may construe the will if necessary to make distribution. *Baldwin v. Smith*, 3 App. Div. 350, 73 N. Y. St. Repr. 666, 38 N. Y. Supp. 299.

Where will gives one representative the use of the estate and authorizes a sale, such representative receives the fund under the power of sale and a corepresentative is not liable for the loss of the fund. *Matter of Blauvelt*, 131 N. Y. 249; rev'g, 60 Hun, 394,

39 N. Y. St. Repr. 774, 15 N. Y. Supp. 586; which aff'd 20 id. 119.

Where real estate devised to an infant is subject to a power of sale and such sale is made, the proceeds may be distributed to such infant through the accounting of the executor. *Matter of McKay*, 75 App. Div. 78, 77 N. Y. Supp. 845; rev'g, 37 Misc. Rep. 590, 75 N. Y. Supp. 1069.

The fund arising from a sale has always been considered as in the hands of the executor or administrator as a trust fund for the heirs, and not in a representative capacity as executor or administrator. *Stilwell v. Swarthout*, 81 N. Y. 109.

The surrogate has always been vested with the power to require an accounting of the proceeds of land sold under a power (§ 2726, Code Civ. Pro.), and in settling such account he may construe a will so far as that is necessary. *Baldwin v. Smith*, 3 App. Div. 350, 73 N. Y. St. Repr. 666, 38 N. Y. Supp. 299; aff'g, 91 Hun, 230, 72 N. Y. St. Repr. 60, 36 N. Y. Supp. 169.

Statute of Limitations against accounting.

The time when the Statute of Limitations will begin to run against an application to account is when the executor or administrator received the money and if that is not shown then from the time he makes a report of sale. *Matter of Sargent*, 42 App. Div. 301, 59 N. Y. Supp. 105.

Real estate bid in under foreclosure of mortgage held by deceased. See ¶ 203.

Where real estate covered by a mortgage owned by the deceased has been bid in and carried, it is personal property and should be accounted for as such. *Archer v. Archer*, 147 App. Div. 44, 131 N. Y. Supp. 661.

¶ 397 Personal Property Owned by Husband and Wife Jointly. See ¶ 425.

The rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rests upon different grounds than those which support a tenancy

by the entirety. Under the Married Woman's Acts the wife is to be regarded as if she were sole with respect to her property rights, and she may unite with her husband in the purchase of personal property with her separate funds, and the interest which each will acquire in the subject of the purchase will not be affected by the marital relation. The law now regards them as standing upon the same plane of equality as if they were strangers to each other.

We are aware that many authorities hold that, where the husband purchases a security or makes a deposit or subscribes for stock in the joint name of himself and wife and pays therefor with his own funds, upon his death the entire security belongs to the wife if she survives him. But the decision in all these cases is put upon the ground that it is apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transfer possesses all the essential qualities of a gift *causa mortis*, which he may revoke in his lifetime and which does not take effect until his death if not previously recalled. While he lives his control over it is unlimited and at his death it becomes her absolute property if she survives him, but if she does not the gift is not consummated, and the husband retains the entire title. This was the rule laid down by Lord Eldon in *Wilde v. Wilde*, where it was held that if the husband purchased stock in the joint name of himself and wife it was *prima facie* a gift to her in case of her surviving, unless evidence was produced of cotemporaneous acts showing a contrary intention. But if the husband and wife each contribute to a joint investment or to the purchase of security and the title is taken in their joint names to be held by them, their executors, administrators, or assigns, no presumption can properly arise from the nature of the act that either intended to make a gift of his or her share to the survivor. The just inference is that each regarded it as a loan of individual property upon the strength of the security taken, and they became tenants in common of the security with all the rights and incidents of

such relationship. *Matter of Albrecht*, 136 N. Y. 91; rev'g, 56 Hun, 650, 32 N. Y. St. Repr. 193, 10 N. Y. Supp. 388.

Maker of a note to husband and wife was later the executor, with the wife, of the estate of the payee — *held*, that the maker executor could retain the note in his possession as assets. *Sanford v. Sanford*, 45 N. Y. 723.

Where a husband lends money and takes a note payable to himself and wife and dies, the note is a gift to the wife and is no part of the husband's estate. *Sanford v. Sanford*, 58 N. Y. 69.

Where a husband invests his own money in a security taken in the names of himself and his wife and the investment remains unchanged during his life, if there is no evidence outside of the documentary vestiges of the transaction to characterize its purpose, the security belongs to the wife upon the death of the husband. *Sanford v. Sanford*, 45 N. Y. 723; S. C., on second appeal, 58 id. 69; *Wilcox v. Murtha*, 41 App. Div. 408, 58 N. Y. Supp. 783; *Fowler v. Butterly*, 78 N. Y. 68, 72; *West v. McCullough*, 123 App. Div. 846, 108 N. Y. Supp. 493.

In *Fowler v. Butterly*, *supra*, the rule, though not essential to the decision, is stated as well settled; and in *West v. McCullough*, *supra*, although the simple form of the deposit was not the only evidence of the intention, the conviction of the majority of the court is apparent that in the absence of any supplementary proof the fact of the deposit alone created a presumption or a controlling indication that the parties intended that the survivor should take the fund.

Matter of Albrecht, 136 N. Y. 91, is not arrayed against the rule found in these cases. There the money invested belonged half and half to the husband and wife, and they were, therefore, held to be owners in common of the security. The feature of equal contribution by the parties has been held to distinguish the case last cited. *West v. McCullough*, 123 App. Div. 849.

The rule by which to determine whether or not the survivor is

entitled to the proceeds of the investment should be the same whatever may be the variation in the kind of investment; and the courts have not only applied it upon the same reasoning to notes, bonds and mortgages and deposits in bank, to which husband and wife were parties, but have interchangeably cited the cases arising upon these several forms of investment.

Nothing seems to break the current of these decisions except the case of *Matter of Baum*, 121 App. Div. 496, 106 N. Y. Supp. 113.

A mortgage taken in the names of husband and wife held to be joint property. *Matter of Kaupper*, 141 App. Div. 54, 125 N. Y. Supp. 878; aff'd, 201 N. Y. 534; *Matter of Niles*, 142 App. Div. 198, 126 N. Y. Supp. 1066.

Deposits in joint names of husband and wife. See ¶ 194.

While joint tenancy is not favored either in law or equity, yet on account of the peculiar relations of husband and wife a deposit by either in the names of both will be held to create a joint tenancy in the fund, and the survivor will take the fund.

Deposit by husband in name of his wife or himself or the survivor of them entitles either or the survivor to claim the fund, even though the pass-book always remains in the possession of the husband. *McElroy v. Alb. Sav. Bank*, 8 App. Div. 46, 74 N. Y. St. Repr. 862; *In re Meehan*, 59 App. Div. 156, 69 N. Y. Supp. 9.

In *Pietraroia v. N. J. & H. R. R. Co.*, 197 N. Y. 434, the Court of Appeals, while not deciding that point said regarding the effect of a deposit in the name of G. and husband F., or either, that the husband surviving had the right to draw the money by the very terms of the deposit.

Separate deposits of husband and wife merged by an order signed by them and filed with the bank making the merged account payable to both or the survivor is properly payable to the survivor. *Augsbury v. Shurtliff*, 114 App. Div. 626, 99 N. Y. Supp. 989; aff'd, 190 N. Y. 507.

A joint deposit of the husband's money in the names of a hus-

band and wife becomes the sole property of the wife on the death of the husband. *Matter of Brooks*, 5 Dem. 326, 5 N. Y. St. Repr. 381; *Rom. Cath. O. Asy. v. Strain*, 2 Bradf. 34; *Platt v. Grubb*, 41 Hun, 447, 1 N. Y. St. Repr. 494.

While the intention of the depositor will govern the court will presume an intention to benefit a wife when a husband makes a joint deposit. *West v. McCullough*, 123 App. Div. 846, 108 N. Y. Supp. 493; aff'd, 194 N. Y. 518.

The fact that the marriage between the parties supposed to exist at the time of the deposit was not a valid one, will not deprive the woman living with the man at that time as his wife of the right to the fund as survivor. *Matter of Eysel*, 65 Misc. Rep. 432, 121 N. Y. Supp. 1095; aff'd, 147 App. Div. 911, 132 N. Y. Supp. 1127.

Admissions.

Admissions of the wife against her interest are competent, and also declarations of both husband and wife made in the presence of each other. *Moore v. Fingar*, 131 App. Div. 399, 115 N. Y. Supp. 1035.

¶ 398 Liability for Loss of Property, or for a Decrease in Its Value; All Profit Must be Accounted for.

The law recognizes the fact that in settling an estate there may be losses over the inventory value, or that property may not bring its full value, and that through no fault of the representative.

To meet this situation, and to authorize the court to make the proper allowances for those losses section 2733 has been enacted. While relieving the representative from any loss, without his fault, it also provides that he shall make no personal profit by the increase in value of any of the property in his charge. Such increase must benefit the estate and not the representative, and he must charge himself with all such increase as carefully as he credits himself with decrease or loss. See ¶¶ 393, 399, 413.

Accounting for profit and loss.

No profit shall be made by an executor, administrator, guardian or testamentary trustee by the increase, nor shall he sustain any loss by the decrease or loss, without his fault, of any part of the estate or fund; but he shall account for such increase, and be allowed for such decrease or loss on the settlement of his accounts.

§ 2733, Code Civ. Pro.

Effect of revision. Part of former § 2729.

This part of former section 2729 was amended to include accountings of guardians and trustees, and by adding the words "or loss" after "decrease" the last sentence of the original part of the section was omitted.

Liability for loss of funds on deposit.

An administrator is chargeable with negligence when he removes funds from a safe bank and deposits them in a bank whose affairs he directed and which was known by him to be in financial straits. *Matter of Scudder*, 21 Misc. Rep. 179, 47 N. Y. Supp. 101.

Administrator was charged interest on funds removed from one bank to another and lost at rate the first bank was paying. *Matter of Scudder*, 21 Misc. Rep. 179, 47 N. Y. Supp. 101.

Charged for loss by sale on credit.

Where the executor or administrator sells assets upon credit he is chargeable with the whole amount of the selling price and cannot relieve himself by showing that the selling price was greater than the value of the property. *Hasbrouck v. Hasbrouck*, 27 N. Y. 182.

Where a person interested buys property of the estate and makes an agreement to pay the value of the same or have it deducted from his share, the Statute of Limitations does not run against the right to deduct it. *Schneider v. Heilbron*, 115 App. Div. 720, 101 N. Y. Supp. 152.

Where an executor or administrator sells assets upon credit and takes a note, action upon the note must be in the individual

name of the representative. Sections 449 and 1814, Code Civ. Pro., have not changed the rule. *Thompson v. Whitmarsh*, 100 N. Y. 35.

Charged with loss by poor loans.

An executor lending money of the deceased upon bond, promissory notes, or other personal security is guilty of a breach of trust and is personally answerable if the security prove defective. *Lefever v. Hasbrouck*, 2 Dem. 567.

Where an executor-trustee loans money on real estate he is not liable for losses arising from depreciation in the value of the property occurring after the investment and caused by a general depression in prices. *Atlantic Trust Co. v. Powell*, 23 Misc. Rep. 289, 50 N. Y. Supp. 866.

Representatives having no right to invest the estate money in stocks will be charged with any loss occasioned thereby. *Lacey v. Davis*, 5 Redf. 301.

¶ 399 Liability for Loss by Depreciation of Value of Real Estate and Securities. See ¶ 398.

An executor will not be held liable for loss by depreciation in value of real estate unless his negligence has occasioned the loss. The rule to be applied is well stated in *Matter of Brower*, 71 Misc. Rep. 398, 130 N. Y. Supp. 191, as follows:

It is not enough for the contestants of an account to show that the representatives of the estate did not get the highest price obtainable; it must be shown that they acted negligently, and with an absence of diligence and prudence which an ordinary man would exercise in his own affairs. An honest mistake will not furnish basis for charging the executors. It is true, that negligence without loss creates no liability. Loss and negligence concurring create no liability of themselves, unless the loss is the result of the negligence. The essential thing is that the negligence must be the cause of the loss.

At testator's death the property was depreciated and the executors delayed a sale considerable time hoping for an increase in value, but it depreciated still more — *held*, that the executors were not chargeable with the loss or with the expenses of its care. *Matter of Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

Executor liable for failure to sell real estate.

Upon an accounting the surrogate has jurisdiction to charge an executor with any loss to the estate resulting from negligence or bad faith, *e. g.*, in not selling real estate when directed by the will so to do. *Haight v. Brisbin*, 100 N. Y. 219.

May be charged for loss on account of failure to recover property fraudulently conveyed. See ¶ 262.

Where the estate is insolvent and the deceased disposed of property fraudulently, the representative should seek to recover it. *O'Conner v. Gifford*, 117 N. Y. 275; *Matter of Johnston (Hart)*, 60 Hun, 516, 39 N. Y. St. Repr. 521; 74 Hun, 618, 56 N. Y. St. Repr. 692; *aff'd*, 144 N. Y. 563.

The representative may maintain an action to set aside a transfer of a bank deposit on the ground of fraud and undue influence, and where the facts show grave suspicion the burden is upon the defendant to show absence of fraud and that the transaction was fair. *Derrick v. Emmens*, 38 N. Y. St. Repr. 481.

Liability for the depreciation in the value of securities.

The duty of an administrator is to convert the estate of the deceased into money as soon as it can be reasonably done; to pay the debts and make distribution. In accomplishing this, he is to exercise the diligence and prudence which in general a prudent man of discretion and intelligence in such matters employs in his own like affairs. He may find among the assets of the estate that have come to his hands stocks of a somewhat dangerous and speculative character, subject to great and sudden fluctuation of value, which it is his duty to care for and dispose of

with all their inherent risks on the one hand and possibilities on the other.

It is not the duty of the administrator at once to dispose of such assets without regard to the market price or the demand for them, or the ruling prices or the possibilities of an advance in their value.

When there is a direction to sell, reasonable time must be given and where there are no modifying facts to shorten or lengthen a reasonable time a period of eighteen months may be considered reasonable. *Matter of Thompson*, 41 Misc. Rep. 420; aff'd, 87 App. Div. 609, 178 N. Y. 554.

The representative should not be charged with loss or depreciation of securities which are legal investments, if he has exercised such prudence and diligence in their care and management as prudent men employ in their own affairs. *McCabe v. Fowler*, 84 N. Y. 314.

The burden is upon the representative to show lack of fault on his part where the selling price of property was less than the inventory. *Underhill v. Newburger*, 4 Redf. 499.

¶ 400 Liability for Uncollected Demands.

In such an action or special proceeding, the executor or administrator shall not be charged with a demand or right of action, included in the inventory, unless it appears that the same has been collected, or might have been collected with due diligence.

§ 1833, Code Civ. Pro.

It is no defense for the representative to say that the collection of the claim was not sure and that no interested party requested him to sue. *Harrington v. Keteltas*, 92 N. Y. 40.

Liability for failure to collect asset.

In the accounting of an executor, where he seeks credit for not collecting any asset of the deceased by reason of the same being worthless, the burden of establishing this fact must be borne by the executor, as insolvency of a person, or the mere inability to pay his debts and obligations, will not only not be presumed,

but, on the contrary, the law indulges in the presumption that all persons are solvent. *Matter of Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

The rule by which we must judge of the conduct of the executor under these facts seems to be that where he knows of no proof to establish that the property belongs to the estate and is advised by his counsel in good faith and believes he cannot make such proof, he cannot be held liable. *O'Conner v. Gifford*, 117 N. Y. 275; *Matter of Hall*, 16 Misc. Rep. 174, 38 N. Y. Supp. 1135; *Matter of Joost*, 50 Misc. Rep. 78, 100 N. Y. Supp. 378.

The representative may be charged with the loss arising on the sale of the chattel where he fails to give due notice of sale. *Matter of Johnston*, 144 N. Y. 563; aff'g, 74 Hun, 618, 22 N. Y. Supp. 966, 56 N. Y. St. Repr. 692.

An executor failed to collect a known debt and allowed the statute to run against it — *held*, that he was liable for the debt as money collected and that as to such liability the Statute of Limitations did not begin to run against him until it had run against the original debt. *Harrington v. Keteltas*, 92 N. Y. 40; *In re Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

If on examination of the facts it appears that a suit would not have been effectual, the representative should not be charged. *Matter of Hall*, 16 Misc. Rep. 174, 38 N. Y. Supp. 1135.

Where the representative seeks credit for an uncollected note, the burden is upon him to show the insolvency of the makers, since solvency is presumed. *Matter of Kemp*, 49 Misc. Rep. 396, 100 N. Y. Supp. 221; *Matter of Hosford*, 27 App. Div. 427; *O'Conner v. Gifford*, 117 N. Y. 275.

An executor bringing an action as such on a claim alleged to be due the estate will not be charged with costs personally unless bad faith is shown. *Hone v. De Peyster*, 106 N. Y. 645; rev'g, 44 Hun, 487.

The *onus* is upon the executor to show a fair reason why he did not commence proceedings to collect a debt, and it is only necessary, in the first instance, for him who insists upon a *devasta-*

vit to show the existence of a debt, and that the executor has taken no steps to collect it. The presumption is that it could have been collected, as the usual course is for men to pay their debts, and solvency is presumed until the contrary is shown. This is what was decided in *Stiles v. Guy* (16 Sim. 230, 39 Eng. Ch. 229), the vice-chancellor remarking: "Those who seek to exonerate themselves from a debt due from a third person ought to prove that that person could not have paid the debt. If a debt is due the law presumes, until the contrary is shown, that the debtor can pay it. Insolvency cannot be presumed." The same principle is held in *Harrington v. Keteltas* (92 N. Y. 40), where the Court of Appeals held that the executor, hearing of a debt due the estate, was bound to active diligence for its collection, and that he could not wait for a request from the distributees. The existence of the debt being proved, the duty of active diligence was enjoined upon the executor. In that case and upon the facts therein appearing, the court, per Danforth, J., regarded the neglect to prosecute not only as an omission, but as a willful default amounting to positive collusion.

Active vigilance is a relative term, and what it is depends upon the facts appearing in each case. As to where the *onus* lies in making proof of the facts, there can be but little question. A debt being proved the presumption is that it is collectible, as solvency, and not the contrary, is to be presumed. But when the *onus*, being shifted to the executor, is met by proof on his part of the absolute, irretrievable, and hopeless insolvency of the debtor, does any rule of active vigilance demand the institution of legal proceedings by the executor against such insolvent debtor? Does active diligence require the commencement of an action to obtain possession of property which the executor claims belongs to the estate, although, at the same time, he does not know how he can prove that the property does belong to it, and he is also advised by his counsel, in good faith, that he cannot make such proof, and he really believes it? All the facts being in, the question arising for determination is whether the conduct of the exec-

utor has been guided by good faith, reasonable judgment, and an intention to fairly and fully discharge his duty. If so, it cannot be that he should still be held liable for a *devastavit*. No duty of active vigilance would make it necessary to sue an absolute and hopeless insolvent, nor to commence an action when he was entirely ignorant as to where to find proof to maintain it. *O'Conner v. Gifford*, 117 N. Y. 275, dist'g, *Hawley v. James*, 16 Wend. 61.

An executor failed to collect a known debt and allowed the statute to run against it — *held*, that he was liable for the debt as money collected and that as to such liability the Statute of Limitations did not begin to run against him until it had run against the original debt. *Harrington v. Keteltas*, 92 N. Y. 40; *In re Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

If on examination of the facts it appears that a suit would have been ineffectual, the representative should not be charged. *Matter of Hall*, 16 Misc. Rep. 174, 38 N. Y. Supp. 1135.

Where the representative seeks credit for an uncollected note, the burden is upon him to show the insolvency of the makers, since solvency is presumed. *Matter of Kemp*, 49 Misc. Rep. 396, 100 N. Y. Supp. 221; *Matter of Hosford*, 27 App. Div. 427; *O'Conner v. Gifford*, 117 N. Y. 275.

An executor bringing an action as such on a claim alleged to be due the estate will not be charged with costs personally unless bad faith is shown. *Hone v. De Peyster*, 106 N. Y. 645, rev'g, 44 Hun, 487.

¶ 401 Liability for Debts Paid Which Were Barred by Statute, or Which Were Illegal.

An outlawed debt is not a proper payment and cannot be allowed the accounting party. *Willson v. Willson*, 2 Dem. 462. See also 36 N. Y. 255, 36 *id.* 88, 71 *id.* 1.

That a claim is barred by the Statute of Limitations can be raised by any next of kin or any creditor, even against the wishes of the administrator. *Visscher v. Wesley*, 3 Dem. 301.

A creditor has the right to object to the allowance of a claim alleged to be barred by the Statute of Limitations, where the assets are insufficient to pay both. *Matter of Kendrick*, 107 N. Y. 104.

But where a personal representative without the right to do so waives the statute and pays a barred debt he will not be allowed in his accounting for the sum so paid. *Spicer v. Raplee*, 4 App. Div. 471, 38 N. Y. Supp. 806; *Matter of Hill*, 2 Connolly 25, 7 N. Y. Supp. 328; *Burnett v. Noble*, 5 Redf. 69.

Should be charged with amount paid for illegal debts or expenses.

Debts of honor.

Payment of illegal debts of honor cannot be allowed over objection. *Matter of Hull*, 97 App. Div. 258, 89 N. Y. Supp. 939.

Doubtful debt compromised.

Where the representative acts in good faith and with judgment, and compromises a doubtful claim, he will not be charged with the amount so paid, but may have credit therefor. *Matter of Baruth*, 62 Misc. Rep. 596, 116 N. Y. Supp. 1125.

Charging loss by default in paying taxes.

Where there is no evidence to show that the executor might have paid the transfer tax within six months, he should not be charged with the loss of the rebate. *Matter of Sudds*, 32 Misc. Rep. 182, 66 N. Y. Supp. 231.

Representative who makes default in paying taxes when he has funds on hand is chargeable with the penalties. *Tickel v. Quinn*, 1 Dem. 425.

May be charged with collusive and invalid judgment.

Executors may be charged with the amount of a judgment against them paid by them on proof that the claim was in fact invalid and that they were guilty of negligence and collusion in defending against it. *Matter of Saunders*, 4 Misc. Rep. 28, 23 N. Y. Supp. 829; *Matter of Watson*, 101 App. Div. 550, 92 N. Y. Supp. 195.

Section 2680, Code Civ. Pro. (¶ 220) establishes the same rule as to the effect of the admission and allowance of claims.

¶ 402 Liability for Interest.

Administrator did not distribute as soon as he might have done and allowed funds to lie in bank at 2 per cent. interest — *held*, not chargeable with more. *Matter of Sudds*, 32 Misc. Rep. 182, 66 N. Y. Supp. 231.

Executors have been charged with interest where by their wrongful acts as by mispayments, they have disappointed claimants, and where without reason they have recalled funds out at interest, and where they unreasonably refuse or neglect to account. *Matter of Oosterhoudt*, 15 Misc. Rep. 566, 72 N. Y. St. Rep. 808, 38 N. Y. Supp. 179.

Interest not earned was not charged on funds received after the accounting began although delayed by litigation. *U. S. Trust Co. v. Bixby*, 2 Dem. 494.

Administrator charged with interest at 1½ per cent. on idle money after a year from granting letters. *Matter of Mapes*, 5 Dem. 446, 6 N. Y. St. Rep. 668.

Where estate funds are used in the business of the representative, he may be charged legal interest thereon. *Matter of Myers*, 131 N. Y. 409.

There is no hard and fast rule fixing the liability of representatives for interest. The rate is to be determined from an examination of all the circumstances in each case, the most important of which is good or bad faith. Where a representative loans money on a note made by himself or another, such loan is illegal in the sense that he takes the risk and must make the principal good with legal interest in event of loss. It does not follow, however, that if he loans in such a manner at 5 per cent. and the loan and interest are paid, he should be charged with 1 per cent. more because he took the risk. *Matter of Downs*, 39 Misc. Rep. 621, 80 N. Y. Supp. 659.

In *King v. Talbot* (40 N. Y. 76), 6 per cent. was charged while the legal per cent. was seven.

In *Matter of Myers* (131 N. Y. 409, 416), a speculative business was carried on by the representative with the testator's capital.

In *Matter of Thorp* (31 Misc. Rep. 581, 65 N. Y. Supp. 575), the assets of the deceased had lost their identity as estate funds and become individual capital.

In *Matter of Hall* (164 N. Y. 196; mod'g, 48 App. Div. 488), the funds were invested in a manufacturing business which failed and most of the investment was lost.

In *Matter of Wotton* (59 App. Div. 584; aff'd, 167 N. Y. 629), a similar loss occurred.

In *Baker v. Disbrow* (18 Hun, 29; aff'd, 70 N. Y. 631), there was an entire loss of principal and a partial loss of income.

In *Adair v. Brimmer* (74 N. Y. 539), no income was derived and there was a loss of principal.

Charging interest.

Method of computing interest chargeable to trustees where they have made advancements stated. *King v. Talbot*, 40 N. Y. 76.

Interest on funeral expenses.

Since the representative is required to apply the first money coming to his hands in payment of the funeral expenses, he can not be allowed for interest paid thereon, where he had funds on hand to make such payment. *Matter of Woods*, 55 Misc. Rep. 181, 106 N. Y. Supp. 471.

Compound interest.

Where the executor mingled the estate funds with his own and used them in his business, he was charged compound interest. *Berwick v. Halsey*, 4 Redf. 18; *Ackerman v. Emott*, 4 Barb. 626; *Lansing v. Lansing*, 45 id. 182; *Matter of Kernochan*, 104 N. Y. 618.

Compound interest should be charged only upon evidence of gross delinquency or intentional violation of duty. *Tucker v. McDermott*, 2 Redf. 312; *Wilmerding v. McKesson*, 103 N. Y. 329.

Interest on his own debt.

A representative was charged interest on his own debt at 6 per cent. from the time he qualified until payment. *Warner v. Knower*, 3 Dem. 208.

Charging guardian with interest.

Where the ward's estate was small and allowed to remain in bank, the guardian was charged with interest on an undeposited sum at the rate the money in the bank was drawing. *Matter of Ward*, 49 Misc. Rep. 181, 98 N. Y. Supp. 923.

Where a guardian had properly advanced his own funds for benefit of the ward he was allowed interest on his advancement at 4 per cent. interest. *McCormick v. Shannon*, 127 App. Div. 745, 111 N. Y. Supp. 875.

¶ 403 Liability for Waste.

Where a trustee is merely passive and simply does not obstruct the collection by his associate, he is not liable for the latter's waste, if guilty of no negligence himself. *Bruen v. Gillet*, 115 N. Y. 10; *Matter of Mallon*, 43 Misc. Rep. 569; *Croft v. Williams*, 88 N. Y. 384.

A trustee is not responsible for the conduct of his cotrustee where the trust estate was managed exclusively by such cotrustee. *Meldon v. Devlin*, 20 Misc. Rep. 56, 45 N. Y. Supp. 333.

A surrogate may charge a trustee with loss resulting from gross negligence and bad faith in not selling real estate which he is directed to sell. *Haight v. Brisben*, 100 N. Y. 219.

Liability of one executor for waste of coexecutor.

If the executor does any act, by which the money or property of the estate gets to the hands of the coexecutor who diverts or wastes it, and but for which act the latter would not have had it, a liability to make good the loss results. *Croft v. Williams*, 88 N. Y. 384; *Ormiston v. Olcott*, 84 id. 339.

The representative who knows that the corepresentative is receiving and handling the funds of the estate is charged with the active duty of investigation and learning the true condition of the fund. *Wilmerding v. McKesson*, 103 N. Y. 329.

An executor who knows that his coexecutor has misapplied the funds of the estate is liable for money which he allows him to

thereafter receive. *Matter of Mallon*, 43 Misc. Rep. 569, 89 N. Y. Supp. 554.

Where one representative knows or has the means of knowing of the irregular investments by a corepresentative and assents thereto, either expressly or passively, he cannot in the absence of fraud or misrepresentation escape responsibility therefor. *Matter of Peck*, 31 App. Div. 407, 52 N. Y. Supp. 1028; *Matter of Niles*, 113 N. Y. 547.

Where one representative takes no active part and has no reason to apprehend that the corepresentative will mismanage the fund, he will not be held liable. *Cocks v. Haviland*, 124 N. Y. 426; *Nanz v. Oakley*, 120 id. 84.

Where one representative has no knowledge of misapplication of funds by the other and is guilty of no negligence in not discovering it, he should not be charged with the loss. *Matter of Adams*, 51 App. Div. 619, 64 N. Y. Supp. 591; aff'd, 166 N. Y. 623.

An executor who sits by and sees his coexecutor receive estate money, knowing that he is in embarrassed circumstances and needs money, is not liable for the latter's misappropriation. *Croft v. Williams*, 88 N. Y. 384.

CHAPTER LIII.

Final Judicial Settlement, Continued; With What Payments and Property the Accounting Party Should be Credited.

- ¶ 404. Credit for all legal debts.
- ¶ 405. § 2692. Credit for expenses of administration.
- ¶ 406. Credit for expenses of clerical work and agents' commissions.
- ¶ 407. Credit for expenses of unsuccessful probate, and in partial intestacy.
- ¶ 408. Credit for counsel fees.
- ¶ 409. Credit for paying taxes.
- ¶ 410. Credit for expenses of trust property.
- ¶ 411. Credit for debts and funeral expenses paid.
- ¶ 412. Credit for unpaid balance on land contract.
- ¶ 413. Credit for principal and property used, consumed or lost.
- ¶ 414. Credit for overpayment.
- ¶ 415. Set-off of judgments and debts.
- ¶ 416. Credit for advance payments to widow or infants.

¶ 404 With What Payments and Property the Representative Should be Credited.

The representative is entitled to have credit for the funeral expenses of the deceased and for his own proper expenses which he has necessarily incurred in transacting the business of the estate. Generally speaking, all of the expenses incurred by him become his own liabilities which he must pay and credit in his account. He is not required, however, to advance his own money to pay such expenses, but they may be paid from the funds of the estate. (§ 2692, ¶ 405.) If, however, such expenses are not allowed to him upon the judicial settlement he must reimburse the estate from his own funds. All of the valid debts of the deceased should be paid as soon as they are ascertained by the publication of notice to creditors, and as soon as it is clear that there is personal property sufficient to pay them in full. The various classes of debts and their validity are set forth in ¶¶ 226 to 229.

The surrogate has no jurisdiction in advance of judicial settlement to pass upon the reasonableness and propriety of attorney charges rendered to the estate. The representative should be guided in making such payments by his own judgment. *Matter of Cohn*, 5 Dem. 338.

¶ 405 Credit for General Expenses of Administration.

Heretofore the authority for allowing an accounting party for his general expenses of administration has been found in section 2730 which referred particularly to his commissions and personal expenses. Under that section only those expenses could be allowed which had been paid, and although the courts have appreciated the injustice of such restriction they have endeavored to adhere to it, and often the result has been an injustice to the officer of the court.

The revision of 1914 has given us a new section (§ 2692) which in terms authorizes allowances for general expenses of administration, and also removes the restriction that the representative, guardian or testamentary trustee must advance from his private funds all such expenses, and await his judicial settlement, not occurring perhaps for many years, for reimbursement. He is now permitted to pay these disbursements from the money of the estate or fund, as in fact has been a quite general custom, and credit himself with them in his account. If such payments are not allowed, his account will be surcharged therewith.

Payment of expenses incurred by representative.

An executor, administrator, guardian or testamentary trustee may pay from the funds or estate in his hands, from time to time, as shall be necessary, his legal and proper expenses of administration necessarily incurred by him, including the reasonable expense of obtaining and continuing his bond and the reasonable counsel fees necessarily incurred in the administration of the estate. Such expenses and disbursements shall be set forth in his account when filed, and settled by the surrogate.

§ 2692, Code Civ. Pro.

Under this section the requirement that the amounts must be paid is not changed, but there will be little disposition, as heretofore, to postpone payment.

Proof of the Expenses of Administration Should be Made by the Accounting Party. See ¶ 387.

Proof that expenses of administration were necessary and are legal and proper charges is made by the statements in the account regarding them and by the vouchers filed. Unless objection be made thereto by the surrogate or by some party to the proceeding no further proof need be made.

If objection is made the expenses of administration must be justified by affirmative proof. The surrogate is not bound to allow such items because a voucher is filed therefor and the objector offers no testimony. *Journault v. Ferris*, 2 Dem. 320.

Affirmative proof may consist of the contents of the account and vouchers, or other testimony may be necessary. In *Matter of White*, 6 Dem. 375, 15 N. Y. St. Repr. 729, it was held that the burden of disproving a charge for administration expenses fair and proper upon their face and accompanied by vouchers is upon contestant.

This case goes further than any other case in support of such rule, and should not be understood to mean that the representative has only to produce his vouchers and rest. His account as to such items and his vouchers in support thereof may be so full and complete that he is willing to rest his case upon them, otherwise he must make clear proof of each item.

The naked fact of payment is not sufficient to cast the burden of impeaching its justness upon the objector. *Matter of Harnett*, 15 N. Y. St. Repr. 725.

¶ 406 Allowing Credit for Bookkeeping and Other Clerical Work. Brokers' and Agents' Commissions. See ¶¶ 180, 182.

There are many instances where the necessary expense of employing clerks and bookkeepers should be allowed to representatives. The courts will not enforce a rule that would make the acceptance of a trust a personal burden, but on the other hand the courts have been careful not to allow such expenditures in cases

where such allowance would tend to create a rule that the one duty which the law devolves upon such an officer is to employ others to perform all of the various duties necessary to the conduct of the trust. *Matter of Harbeck*, 81 Hun, 26, 30 N. Y. Supp. 521; aff'd, 145 N. Y. 648.

Where representatives employ other persons to manage the estate for them or permit them to do so, they become liable for all losses which may occur through negligence or incompetency. *Earle v. Earle*, 93 N. Y. 104.

Where an executor removes from the State before he finishes his duties, he will not be allowed as expenses the amount paid an agent with whom the conduct of the business was left, nor for his own carfare, etc., in returning to the State. *Matter of Ingersoll*, 6 Dem. 184, 20 N. Y. St. Rep. 356.

Executors not allowed \$250 for services as accountants in connection with the real estate. *Matter of Hosford*, 27 App. Div. 427, 50 N. Y. Supp. 550.

Brokers and agents.

Whether or not commissions paid to brokers should be allowed depends upon the reasonableness and necessity for their employment. In many places and under many conditions such employment is a necessity and is for the interest of the estate. In such cases reasonable commissions will be allowed. *Matter of Shields*, 68 Misc. Rep. 264, 124 N. Y. Supp. 1003.

Credit for expenses of keeping live stock, horses, etc.

A widow retained a horse for her own use — *held*, that the estate should pay the expense of keeping it. *Matter of Johnson*, 50 Misc. Rep. 99, 100 N. Y. Supp. 373.

Credit should be allowed for hay and grain properly fed out to estate live stock. *Matter of Steward*, 90 Hun, 94, 69 N. Y. St. Rep. 766, 35 N. Y. Supp. 366.

Credit for personal expenses.

There will always be necessary personal expenses incurred in transacting the business incident to the duties of the office which should be allowed, such as reasonable traveling and hotel expenses,

in certain cases, express, telephone and telegraph charges, cartage and perhaps storage, watchmen and care takers. But all these must be actual disbursements and the services can not be performed by the representative and a charge made to the estate therefor.

Executor should not be allowed for the use of his own horse on estate business. *Matter of Ingersoll*, 6 Dem. 184, 20 N. Y. St. Repr. 356.

May be allowed expense of surety bond.

Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section one hundred and eleven of the real property law or under section twenty of the personal property law, required by law to give a bond as such, may include as a part of his necessary expenses such reasonable sum not exceeding one per centum per annum upon the amount of such bond paid his surety thereon as such court or judge allows.

Part of § 3320, Code Civ. Pro.

¶ 407 Credit for Expenses in Case of Failure to Prove Will and in Cases of Partial Intestacy.

Partial intestacy.

Where half of the estate was unbequeathed — *held*, that the executrix named in the will was a trustee for the next of kin and was required to probate the will and take charge of the assets, and she was allowed expenses from the whole estate. *Matter of Ogden*, 41 Misc. Rep. 158, 83 N. Y. Supp. 977.

Expense of probate where executor does not petition.

The expenses incurred by the person interested upon whose petition probate is had must be paid by such person, but may be presented to the executor who qualifies as an expense of administration and will be a charge against the estate. *Boynton v. Laddy*, 50 Hun, 339, 20 N. Y. St. Repr. 148, 3 N. Y. Supp. 93.

Will failing of probate. See § 2746, ¶ 153.

It being the duty of the nominated executor to make all reasonable effort to probate the will, he should be reimbursed by the administrator for his necessary and reasonable expenses.

Dodd v. Anderson, 131 App. Div. 224; *Douglas v. Yost*, 64 Hun, 155; *Matter of Hutchinson*, 84 Hun, 563.

The doctrine as set forth in the above cases was repudiated by the Court of Appeals on appeal in the *Dodd v. Anderson* case (197 N. Y. 466), and this decision led to a change in the Code, section 2558, which is now found in section 2746.

Credit for Expenses of Litigation.

Where costs are allowed against a representative who is plaintiff, it is no evidence that the court allowing them considered that the action was unjustifiable. *Matter of Miller*, 4 Redf. 302.

The executor cannot defeat a judgment for costs given on appeal by first paying his own counsel where the estate is not sufficient to pay both. *Matter of Nichols*, 4 Redf. 288.

Charge for collecting testimony in several suits not allowed. *Matter of Brodhead*, 19 Misc. Rep. 373, 44 N. Y. Supp. 357.

Credit claimed for expenses of litigation can be allowed when such expenses were "necessary," and then for a reasonable amount, and a litigation can be treated as necessary when it has been prosecuted not only in good faith, but also in the exercise of a reasonable judgment. *Matter of Huntley*, 13 Misc. Rep. 375; *Matter of Stanton*, 41 id. 278; *St. John v. McKee*, 2 Dem. 236; *Estate of Peyser*, 5 N. Y. St. Repr. 334; *Matter of Hoffman*, 62 Misc. Rep. 600, 136 App. Div. 516.

An executor if he chooses to serve citations and other papers cannot be allowed for such services. *Matter of Wick*, 53 Misc. Rep. 211, 104 N. Y. Supp. 717.

Costs or disbursements on appeal cannot be allowed by the surrogate from the balance due upon the accounting.

The appellate court has exclusive jurisdiction awarding costs on appeal, and where it does not direct an allowance therefor, the surrogate has no jurisdiction to allow the representative any deduction for attorney fees or disbursements of the appeal. *Matter of McEchron*, 55 App. Div. 147, 67 N. Y. Supp. 18.

Allowance for Costs and Expenses of Guardian.

"A general guardian will be compelled to pay the costs of a contested accounting where the evidence shows maladministration by him of his ward's estate." *Matter of Kopp*, 15 Civ. Pro. Rep. 282, 2 N. Y. Supp. 495, 17 N. Y. St. Repr. 832.

The expenses incurred by the mother to get possession of her son cannot be allowed against his estate, although she was afterward appointed guardian. *Matter of Grant*, 56 App. Div. 176, 67 N. Y. Supp. 654; aff'd, 166 N. Y. 640.

The expenses of legal proceedings should be treated as incurred by the guardian personally until they have been allowed by the court. *Weber v. Werner*, 138 App. Div. 127, 122 N. Y. Supp. 943.

Expenses of Accounting.

The legal expenses of an annual accounting should be paid from the income. *Matter of Long Island L. & T. Co.*, 79 Misc. Rep. 176, 140 N. Y. Supp. 752.

Legal expenses of accounting may be charged against income. *Matter of Fargo*, 68 Misc. Rep. 273, 72 id. 305.

Legal expenses of testamentary trustee connected with the trust are chargeable to the *corpus*. *Matter of Salomon*, 2 Dem. 213.

Expense of guaranty of investment.

Under section 21 of the Personal Property Law, a trustee may contract for a guarantee of his investments, and the expense thereof may be charged to the income of the trust estate. See ¶ 336.

Expenses of intermediate or compulsory accounting.

Expenses of an intermediate or compulsory accounting are made payable by the parties personally or from either *corpus* or income, or divided between *corpus* and income in the discretion of the surrogate, based upon the facts of each particular case. *Matter of Stevens*, 47 Misc. Rep. 560.

¶ 408 Credit for Attorney and Counsel Fees. See ¶¶ 135, 182.

Allowance for services of counsel in another court cannot be made until the charge has been paid and credit therefor is sought. *Shields v. Sullivan*, 3 Dem. 296; *Matter of Spooner*, 86 Hun, 12, 66 N. Y. St. Repr. 762; *Matter of O'Brien*, 5 Misc. Rep. 140, 25 N. Y. Supp. 704.

The alleged payments to counsel for which reimbursement is asked must be actual payments made and not promises of payment. *Matter of Bailey*, 47 Hun, 477, 14 N. Y. St. Repr. 325.

Where a trustee has been negligent in keeping his accounts, so that more time of his attorney has been required in preparing the accounts, full compensation for attorney's fees should not be allowed payable from the estate. *Matter of Van De Veer*, 63 App. Div. 495, 71 N. Y. Supp. 849.

Rules for determining proper compensation to attorney.

The court may take into consideration:

a. The advantages resulting to the client because of such services.

b. The amount of time spent in doing the work for which compensation is asked.

c. The amount involved in the litigation.

d. The novelty and intricacy of the question of law involved. *Matter of Stevens*, 114 App. Div. 609; *Matter of Sewell*, 32 Misc. Rep. 604, 67 N. Y. Supp. 456.

Relation of attorney and client affects contracts for services.

An attorney-at-law is a sworn officer of the court. Some one has said that an attorney's duty is well expressed in the "Institutes" in these words: "The precepts of the law are, to live honestly, to hurt no one, to give to every one his due." Just. Inst. (Cooper's ed.), b. 1, tit. 1, § 3.

In Story's Equity Jurisprudence (13th ed.), § 310, referring to the relation of client and attorney, it is said: "It is obvious

that this relation must give rise to great confidence between the parties and to very strong influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality, and credulity to obtain undue advantages, bargains, and gratuities. Hence, the law with a wise providence not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons would be held unobjectionable."

Owing to the confidential and fiduciary relations between an attorney and his client, and to the influence of the attorney over his client growing out of that relation, courts of law and especially of equity scrutinize most closely all transactions between an attorney and his client.

To sustain a transaction of advantage to himself with his client, the attorney has the burden of showing not only that he used no undue influence but that he gave to his client all the information and advice which it would have been his duty to give if he himself had not been interested and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger.

In *Nesbit v. Lockman* (34 N. Y. 167), the court, referring to a transaction between attorney and client, say: "The transaction is scrutinized with the extremest vigilance and regarded with the utmost jealousy. The clearest evidence is required that there was no fraud, influence, or mistake; that the transaction was perfectly understood by the weaker party." *Matter of Holland*, 110 App. Div. 799; *Ransom v. Cutting*, 112 id. 150.

Reasonableness of attorney charges.

Counsel fees must be reasonable as measured by the ability and success of the attorney and the size of the estate. *Matter of Spooner*, 86 Hun, 9, 33 N. Y. Supp. 136; *Matter of Jones*, 28 Misc. Rep. 599, 59 N. Y. Supp. 1020.

May be allowed reasonable counsel fees in action for construction of will. *Matter of Hutchinson*, 84 Hun, 563, 32 N. Y. Supp. 869.

The surrogate has no jurisdiction to order an executor to pay his attorney charges for such charges are against the executor personally and not as executor. *Hoes v. Halsey*, 2 Dem. 577.

It is the duty of executors to sustain the will of deceased and they will be allowed reasonable counsel fee in such endeavor although the provision attacked be not finally sustained. *Matter of Title G. & T. Co.*, 114 App. Div. 778.

Where a person entitled to an unknown fund makes an agreement to pay a contingent fee before he is appointed administrator only such sum will be allowed on his accounting as the services are reasonably worth. *Matter of Pond*, 42 Misc. Rep. 165, 85 N. Y. Supp. 1080.

Cases considering the justness and reasonableness of counsel fees. *St. John v. McKee*, 2 Dem. 236.

The fact that the representative is personally interested in the result should be taken into consideration in fixing the amount to be allowed. *Matter of Blair*, 28 Misc. Rep. 611, 59 N. Y. Supp. 1090.

Where a will is probated in the State and directs a sale by the executor and trustee of lands in another State and it, therefore, becomes necessary to probate the will in that other State, the executor and trustee will be allowed the costs of such probate. *Young v. Brush*, 28 N. Y. 667.

Not allowed at full amount. *Willson v. Willson*, 2 Dem. 462; 2 Dem. 236, followed.

An estate involving over \$100,000, and contest taking about twenty-five days, a charge of about \$17,000 for attorney's fees was reduced to \$7,000. *Gross v. Moore*, 14 App. Div. 353, 43 N. Y. Supp. 945.

Administrators are personally and equally liable for the payment of an attorney employed by them on their judicial settlement. *Mygatt v. Wilcox*, 45 N. Y. 306.

Allowance for counsel fees in resisting removal.

Where an application to remove executors had been made and they had been required to give a bond, the surrogate refused to make them an allowance for services of counsel, etc., in resisting such application. *Matter of O'Brien*, 145 N. Y. 379.

Where the official incurs expense in showing that he is entitled to hold the office, the expenses of resisting the attack may be allowed, but the rule does not necessarily apply when the attack is made because of conduct in office. *Matter of Higgins*, 80 Misc. Rep. 609. *Matter of Titcomb*, 80 Misc. Rep. 612.

¶ 409 Credit Allowed for Paying Taxes. See ¶ 226.

The administrator paid a personal estate assessment on funds in his hands assessed, R. J. C. executor, S. administrator — *held*, that the assessment was not invalid and that the administrator should have credit for the tax paid. *Matter of Sudds*, 32 Misc. Rep. 182, 66 N. Y. Supp. 231.

Although the estate is insolvent an executor may pay taxes and interest on mortgages to protect the real estate. *Matter of Van Houten's Est.*, 18 Misc. Rep. 524, 42 N. Y. Supp. 1115.

Where the land is sold subject to taxes which accrued before death, the grantee may compel the representative to pay them. *Smith v. Cornell*, 111 N. Y. Supp. 554.

An executor will be charged with interest paid for default in paying taxes where he had money with which to pay them when due. *Tickle v. Quinn*, 1 Dem. 425.

Taxes assessed after the death which are payable by the heirs cannot be credited to the representative, although he paid them at the request of the heirs. *Matter of Selleck*, 111 N. Y. 284.

An assessment against executors before the will is in fact admitted to probate is good and the tax a valid one to be paid by such executors. *People ex rel. Gould v. Barker*, 150 N. Y. 52; *aff'g*, 90 Hun, 609.

Payment for taxes levied and assessed prior to the death of intestate will be allowed. *Matter of Stewart*, 90 Hun, 94, 69 N. Y. St. Repr. 766, 35 N. Y. Supp. 366.

A tax assessed but not yet levied so as to become a lien is still a personal debt of one dying after the assessment is complete but before actual levy, and is payable as a debt by his executor. *Matter of Franklin*, 26 Misc. Rep. 107, 56 N. Y. Supp. 858.

Taxes levied upon real estate after death not allowed. *Matter of Benedict*, 15 N. Y. St. Repr. 746.

A Federal tax paid under a law afterward declared invalid should be recovered by the representative, but he will not be personally charged with the amount so paid. *Matter of Marx*, 117 App. Div. 890.

A sole devisee of the real estate may have all taxes levied at the death of testator paid from the personal estate. *Matter of Dill*, 199 N. Y. 155.

From what fund paid.

Taxes, insurance and other disbursements not being permanent improvements should be paid from income. *Matter of Fuehrer*, 75 Misc. Rep. 596.

When taxes, insurance, and repairs should be paid by life tenant. See ¶ 314.

An executor who is life tenant of the real estate cannot be allowed for payment of taxes, insurance, and repairs. *Matter of Very*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389.

“While the general rule undoubtedly is that repairs and improvements cannot be made at the expense of the remaindermen but must be borne by the life tenant, this rule has been somewhat relaxed by late decisions, and the courts have become inclined to hold that, where improvements of a permanent character have been made to the estate, by compulsion, as in the case of municipal improvements to be paid for by taxation, or where buildings become untenable without neglect on the part of the life tenant, or where improvements are necessary by reason of changed conditions, or in order to obtain a reasonable return

from property which is unproductive, and the expenditure for such improvements is for the best interests of the remaindermen as well as the life tenant, and does not contravene the terms of the instrument creating the life estate and the estate in remainder, the cost of such improvements should be paid out of the *corpus* of the estate or apportioned between the life tenant and the remaindermen according to the benefit accruing to each." *Chamberlin v. Gleason*, 163 N. Y. 214, 219; *Stevens v. Melcher*, 152 id. 551; *Matter of Braunsdorf*, 2 App. Div. 73; *Matter of Deckle-mann*, 84 Hun, 476; *Matter of Whitney*, 75 Misc. Rep. 610.

¶ 410 Whether Taxes and Other Expenses of the Trust Shall be Paid from the Fund or from the Income.

Real property.

It is the settled law of this State that, unless otherwise provided in the instrument creating the trust, the life tenant must bear the expense of ordinary repairs, taxes, interest on incumbrance, if any exist, and insurance. *Matter of Albertson*, 113 N. Y. 434, 21 N. E. 117; *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965; *Chamberlin v. Gleason*, 163 N. Y. 214, 57 N. E. 487; *Dewitt v. Cooper*, 18 Hun, 67; *Wilcox v. Quinby*, 73 id. 524, 26 N. Y. Supp. 114. Circumstances will, in all cases, change this rule to some extent.

And where the investment by force of circumstances, has been changed from personalty to realty, and yielded practically no revenue above an amount sufficient to preserve the fund for the remainderman; a charge against the income cannot be allowed. *Matter of Pitney*, 113 App. Div. 845, 99 N. Y. Supp. 588.

Assessments for permanent improvements cannot be paid for out of the income, and must be paid out of the principal, and the courts seem to hold that the life tenant should pay interest on the amount during life, except in special cases. *Matter of Menzie*, 54 Misc. Rep. 195, 105 N. Y. Supp. 925.

Where the land is unproductive and is held for the benefit of

the remainderman the carrying charges will be paid from the corpus. *Matter of Coombs*, 62 Misc. Rep. 597.

Expenses relating to real estate, such as broker's commission, surveys, mortgage tax and recording fees may be charged against principal. *Matter of Fargo*, 68 Misc. Rep. 273; *Matter of Fargo*, 72 Misc. Rep. 305.

Personal property.

Where the bequest is of the use and income of a specified fund or portion of the estate, the taxes upon the fund and expenses of the trust must be paid out of the income. *Lansing v. Lansing*, 1 Abb. Pr. (N. S.) 280; *Pinckney v. Pinckney*, 1 Bradf. 269; *Lawrence v. Holden*, 3 id. 142.

But where the bequest is of a certain amount of income or of an annuity that sum must be paid from the estate without any deduction on account of taxes imposed upon the fund producing the annuity and, therefore, such expenses must be paid out of the estate. *Whitson v. Whitson*, 53 N. Y. 479.

Intent of testator must govern.

A will may require a construction that it was the intention of the testator that interest on a mortgage, taxes and attorney's fees be paid from the income and not from principal. *Matter of Albertson*, 113 N. Y. 434; *Matter of Brownell*, 60 Misc. Rep. 52.

Permanent improvements.

It is well settled that a municipal assessment for a sidewalk is not in the nature of an annual tax, to be paid entirely by a tenant for life of the premises assessed. Nor is it such a permanent improvement as that the tenant for life should not contribute to its payment, but it should be apportioned between the life tenant and the remaindermen. *Peck v. Sherwood*, 56 N. Y. 615; *Chamberlain v. Gleason*, 163 id. 214.

This rule also applies to the expense for insurance on the building. A widow's portion of the assessment may be com-

puted according to rule 70 of the General Rules of Practice. *Kirchner v. Kirchner*, 71 Misc. Rep. 57.

Repairs.

Repairs made to enhance the rental value of real estate must be paid from income. *Matter of Parr*, 45 Misc. Rep. 564; aff'd, 113 App. Div. 921.

Where buildings have been condemned by the board of health, a part of the *corpus* of the trust estate may be used to make the necessary repairs in order to save the estate from loss and waste. *Smith v. Keteltas*, 32 Misc. Rep. 111, 66 N. Y. Supp. 260; aff'd, 62 App. Div. 174, 70 N. Y. Supp. 1065.

Repairs ordered by the building department of a city should be charged to the principal of the trust estate. *Matter of Parr*, 45 Misc. Rep. 564; aff'd, 113 App. Div. 921.

¶ 411 Credit for Debts and Funeral Expenses Paid. See ¶¶ 176, 233, 272.

The debts of the deceased which are valid and which should be paid by the representative have been heretofore considered. (See ¶¶ 226 to 229.) For these debts the representative should have credit, unless objection is made thereto, in which case a trial of the question of their allowance under section 2680 (¶ 220) may be had. See also ¶ 386.

The funeral expenses which have been paid, and the amounts expended for a modest headstone and burial lot, will also be allowed as credits. (See ¶ 233.)

Credit for medical services and funeral expenses, as between husband and wife.

There is no doubt of the rule that the primary liability for medical treatment furnished to a wife rests upon her husband, and that the wife is not personally liable therefor in the absence of a special agreement by her to make herself responsible. Such an agreement, however, need not be shown by direct evidence, but may be founded upon evidence of surrounding circumstances,

including acts after the service, indicating an acknowledgment of liability for the service. *Matter of Totten*, 137 App. Div. 273.

A charge for medical services furnished wife cannot be allowed in the account of her husband as her representative. *Matter of Very*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389.

Credit for payment of funeral expenses of wife. See ¶ 234.

A husband can credit his account with the funeral expenses of his wife. *Matter of Very*, 24 Misc. Rep. 139, 53 N. Y. Supp. 389; *Patterson v. Patterson*, 59 N. Y. 574; *McCue v. Garvey*, 14 Hun, 562; *Freeman v. Coit*, 27 Hun, 450; *Pache v. Oppenheim*, 93 App. Div. 221.

¶ 412 May Have Credit for Unpaid Balance Due on Land Contract. See ¶¶ 205, 206.

Where the deceased has entered into a contract to purchase real estate, any balance remaining unpaid thereon must be paid from the personal estate of the deceased. *Chamberlain v. Dunlop*, 126 N. Y. 45.

Credit for money paid on the land contract should be allowed, although there is a dispute between the legatees and the representative as to the disposition made of the land. *Matter of Davis*, 43 App. Div. 331, 60 N. Y. Supp. 315.

See *Matter of Roberts* (72 Misc. Rep. 625), where the position seems to be taken that payments on land contracts should not be allowed as a credit to an administrator.

Mortgage debt not payable from personal estate. See ¶ 307.

Where lands descend to an heir or are devised, and the same are subject to a mortgage, such debt is not payable from the personal estate, but becomes an obligation against the land and the heir or devisee, if the devise is accepted. Real Prop. Law, § 250. *Ring v. Woolley*, 155 App. Div. 817.

¶ 413 Credit for Principal and Property Used, Consumed or Lost.

Credit for principal used. See ¶ 280.

Where the executrix is given the life use of the estate with a right to use as much of the principal as she needs, in her account she may credit herself with whatever of the principal of such fund she has used. *Matter of Trelease*, 115 App. Div. 654.

How much of the estate it is proper for a person to use who is given the right to draw upon the *corpus* for support, is a question between such person and the residuary legatees, and may be determined upon any judicial settlement to which they are parties. If such beneficiary properly applies the fund to his support and that only, his acts cannot be questioned, but any residuary legatee may require an accounting and a statement as to how much of the *corpus* has been so applied and as to the uses made of it. *Matter of Hunt*, 38 Misc. Rep. 30; aff'd, 84 App. Div. 159, 179 N. Y. 570.

Where the power of absolute disposition is given with a gift over of the remainder, the life beneficiary need not account to the remainderman concerning the portion so disposed of. *Seaward v. Davis*, 198 N. Y. 415.

Credit for property lost or destroyed.

By section 2733 (¶ 398) the accounting party shall not be held to suffer loss by reason of the depreciation or loss of property without his fault, and he may therefore have credit for such loss or depreciation where he has charged himself with the full value thereof as set out in the inventory.

Where the representative seeks credit for property lost or destroyed, he must show that such loss or destruction occurred through no fault or negligence of his.

He will be held to strict accountability for all the assets which he received or which should have been received by him. He may, however, have credit in his account for any loss which may have

occurred through natural or unavoidable causes, but he must show affirmatively that such loss could not have been prevented by any reasonable effort on his part.

Perishable property.

The representative must use active diligence to prevent the waste or destruction of perishable property, and nothing but proof of proper care and effort will permit him to have credit therefor.

Executor charged with value of hothouse plants which he allowed to freeze. *Matter of Spears*, 10 Misc. Rep. 635, 66 N. Y. St. Repr. 215, 32 N. Y. Supp. 819; aff'd, 89 Hun, 49, 69 N. Y. St. Repr. 428, 35 N. Y. Supp. 35.

Credit for property consumed in its proper use. See ¶ 280.

Personal property consisting of farm tools and implements, hay, grain, produce and supplies are often given to the widow or others for their use. Where the use of the property results in its consumption, the representative should be credited with its value, unless there is evidence from the will that the testator intended that it should be converted into money and the income thereof enjoyed. *Matter of Yates*, 99 N. Y. 94; *Matter of Maack*, 13 Misc. Rep. 371, 35 N. Y. Supp. 111, 69 N. Y. St. Repr. 482.

Live stock.

Where the use of live stock is given it would seem that from the increase thereof the life beneficiary ought to keep the herd or flock renewed so that the same number of head may be turned over to the remainderman.

¶ 414 Credit Cannot be Allowed for Overpayment.

On an accounting by an executor who had made an overpayment to a legatee, the surrogate has no power to render an affirmative judgment for the excess in favor of the executor and against the legatee. *Matter of Underhill*, 117 N. Y. 471.

The surrogate cannot make a decree in favor of the executor for overpayment to a legatee, where more than the income has been paid over. *Johnson v. Weir*, 34 Misc. Rep. 683, 70 N. Y. Supp. 1020.

On judicial settlement the surrogate has no jurisdiction to compel a legatee to whom an overpayment had been made by the executor to restore to the estate the amount of the overpayment. *Matter of Lang*, 144 N. Y. 275; rev'g, 67 Hun, 107, 22 N. Y. Supp. 44; *Matter of Underhill*, 117 N. Y. 471.

While an overpayment cannot be ordered returned, such payments may be taken into consideration and adjusted in a decree. *Matter of Mount*, 27 Misc. Rep. 411, 59 N. Y. Supp. 176.

Overpayment not allowed as credit. *Matter of Hodgman*, 140 N. Y. 421.

Where it is found that the estate is in the hands of the next of kin, the decree cannot confirm such distribution, and order the next of kin to pay back any part thereof to satisfy a charge for debts. *Matter of Keef*, 43 Hun, 98, 6 N. Y. St. Repr. 587.

Recovering overpayment.

An administrator who has overpaid a creditor may recover from such creditor the amount so overpaid in an independent action in the Supreme Court. *Woodruff v. Claflin Co.*, 133 App. Div. 874; aff'd, 198 N. Y. 470.

Where a residuary legatee in the absence of a judicial settlement of the accounts of the executor receives a voluntary payment of money, he is subject to a liability to refund for the benefit of a general legatee who has not been paid. *Buffalo Loan Co. v. Leonard*, 154 N. Y. 141; aff'g, 9 App. Div. 384.

An executor paid over to his coexecutor who was also a distributee more than his share of the estate — held liable. *Adair v. Brimmer*, 74 N. Y. 539.

Payment of legacy thereafter forfeited by contesting will — action to recover will lie. *Kelley v. Winslow*, 73 Misc. Rep. 642.

¶ 415 Payment and Credit by Set-Off of Judgments and Debts. See ¶¶ 215, 228.

Set-off of judgments in the same action but in different courts not allowed. *Smith v. Cayuga L. C. Co.*, 107 App. Div. 524.

Under the enlarged jurisdiction of the court the surrogate may determine the rights between the representative and any creditor or debtor who is a party to the proceeding as to offset of judgments or debts to the end that the mutual claims of the parties may be adjusted and a complete and final decree made.

A judgment is an established debt. See ¶ 228.

A judgment is a debt the validity of which has been established by a court of competent jurisdiction. *Matter of Browne*, 34 Misc. Rep. 362, 71 N. Y. Supp. 1034.

Where the executor buys a claim against a creditor of the deceased he cannot offset it against such creditor's claim. *Weeks v. O'Brien*, 25 App. Div. 206, 49 N. Y. Supp. 544; rev'g, 20 Misc. Rep. 48, 45 N. Y. Supp. 740.

¶ 416 Credit for Advance Payments Made to Widow or Children and Maintenance of Infant.

On an accounting an administrator who has advanced money of the estate, which would, on distribution go to infants, for the support of such infants, they having no general guardian, may properly be allowed such payments, and the surrogate has jurisdiction to make such allowance. *Hyland v. Baxter*, 98 N. Y. 610; aff'g, 31 Hun, 354.

No interest is chargeable on advancements. *Matter of Keenan*, 15 Misc. Rep. 368, 72 N. Y. St. Repr. 823, 38 N. Y. Supp. 426.

An administrator purchased personal property for the widow and she received the same. On judicial settlement he claimed to be credited with the amount so paid out as an advancement of the share of the widow. She denied receiving some of the property and that it was of the value charged — *held*, that the surrogate had no jurisdiction to try such issues. *Barker v. Laney*, 90 Hun, 113, 70 N. Y. St. Repr. 391, 35 N. Y. Supp. 626.

Payment from estate funds for medical services rendered to infant children may be allowed and charged as an advancement to such children when the surviving mother is wholly unable to supply such services. *Willson v. Willson*, 2 Dem. 462.

The administrator seeking credit for money paid to mother for support of infants must show that it was actually expended for the infants. *Matter of Hobson*, 61 Hun, 508, 41 N. Y. St. Repr. 565, 16 N. Y. Supp. 371; aff'd, 131 N. Y. 575.

Money paid by an executor for support of testator's minor children of whom he is also guardian may be allowed in the account. *Matter of Gearn*s, 27 Misc. Rep. 76, 58 N. Y. Supp. 200.

Guardian may be allowed for maintenance from principal of fund. See ¶ 351.

Upon an accounting the guardian may be allowed for support from the principal of the fund in a case where, if he had applied under section 2846 (now § 2664), Code Civ. Pro., an order would have been granted. The principle upon which such an allowance should be computed must necessarily be broad and liberal.

"In making an allowance to the guardian for maintenance we are not to close our eyes to the fact that an accurate account of the expenses of maintaining and educating a child from infancy as a member of a family composed mainly of adults is a practical impossibility. The cost of each loaf of bread consumed cannot be apportioned with absolute accuracy between the infant and the others sharing in it, and to make an exact charge therefor against the infant would be to descend to puerilities. In such cases an approximation to the due share of the infant in the family expenses is all that is required or is possible." *Matter of Klunck*, 33 Misc. Rep. 267, 68 N. Y. Supp. 629.

Allowance for expenses of maintenance out of principal will be made on final accounting where no order therefor had been granted in a case where an order would have been made. *Matter of Klunck*, 33 Misc. Rep. 267, 68 N. Y. Supp. 629.

A guardian was allowed on judicial settlement a fair amount for board of the infant, although no order therefor had been previously obtained. *Matter of Ward*, 49 Misc. Rep. 181.

An allowance for past maintenance may be made a mother who is the guardian of her son and who has supported and maintained him during his minority. *Matter of Winsor*, 5 Dem. 340; *Browne v. Bedford*, 4 Dem. 304.

Where a parent has not sufficient means to support his child, of whose estate he is guardian, he may in a proper case be allowed a reasonable amount for such support both before and after his appointment. The broad rule laid down in some of the earlier cases that no allowance should be made for support given before appointment has been modified by the later cases. *Matter of Wright*, 22 N. Y. St. Rep. 83, 4 N. Y. Supp. 343.

An allowance should not be made to a father for past support of his infant children when he has had sufficient means to provide them proper care and support, unless special reasons are shown. *Beardsley v. Hotchkiss*, 96 N. Y. 201.

Where an infant was entitled to the income of a trust fund and the guardian expended more than the income — *held*, that such expenditure was improper and would not be allowed to the guardian as a debt against the trust fund. *Oakley v. Oakley*, 3 Dem. 140.

Where a fair settlement and accounting has been had between the guardian and late ward, it is binding upon the ward, although in that settlement the guardian credited himself with items that he would not have been allowed on a judicial settlement. *Norris v. Norris*, 85 App. Div. 113, 83 N. Y. Supp. 77.

A surety on a bond of the guardian is entitled to institute the proceedings or to be cited when instituted by another person. *Smith v. Lusk*, 2 Dem. 595; *Eberle v. Schilling*, 32 Misc. Rep. 195, 65 N. Y. Supp. 728; *aff'd*, 63 id. 963.

Where the property of the ward was in a farm, which the testamentary guardian was directed to sell, his failure to sell made him liable as for interest and not for the rent of the farm

as a measure of damages. *Matter of Pruyn*, 68 App. Div. 584, 73 N. Y. Supp. 859.

Taxes paid under an illegal assessment of the trust's funds should not be allowed. *Matter of Pruyn*, 68 App. Div. 584, 73 N. Y. Supp. 859.

Where one person is guardian of one or more wards, the account filed should not be a joint account, but should be a separate account of receipts and disbursements for each ward. *Freeman v. Mohrman*, 1 Dem. 461.

A serious error in the amount of interest with which the guardian has charged himself was considered sufficient to authorize the opening of the decree. *Matter of Flynn*, 48 N. Y. St. Repr. 816, 20 N. Y. Supp. 919; aff'd, 136 N. Y. 287.

A guardian is not absolutely bound to account in court for the property of his ward. He may account out of court when the ward arrives at the age of twenty-one years, and if such accounting be fairly and honestly made, and no advantage taken of the ward, a release given by him to the guardian is just as effective as a decree entered in court. *Matter of Wagner*, 119 N. Y. 28; *Matter of Pruyn*, 141 id. 544; *Forbes v. Reynard*, 113 App. Div. 306.

CHAPTER LIV.

Final Judicial Settlement, Continued; Accounting for and Distribution of Damages Recovered in Negligence Action; Determination of Claims to Property Made by the Representative, and by Other Persons; Determining the Validity of Gifts.

- ¶ 417. § 1902. Action for damages for negligently killing.
- ¶ 418. § 2720. Recovery not assets; judicial settlement.
- ¶ 419. § 1903. Distribution of recovery.
 Allowance for expenses and charges.
- ¶ 420. § 2679. Representative may procure determination of his claim
 against deceased.
- ¶ 421. Claim of executor in which others are interested.
- ¶ 422. Proof required to establish claims.
 Incompetency of witnesses under § 829.
- ¶ 423. Determination of adverse claim to property.
- ¶ 424. General requisites of a valid gift.
 Bonds or securities in marked package.
 Gift of stocks, stamp act.
- ¶ 425. Gifts as between husband and wife.
- ¶ 426. Gifts *causa mortis*.
 Gifts *inter vivos*.
- ¶ 427. § 148 (B. L.). Gift of savings bank books.

¶ 417 Nature of the Fund Realized from a Recovery for Negligently Killing a Person and the Proceeding for the Accounting and Distribution Thereof.

Where the deceased leaves no estate and the only money or property which is in the hands of the administrator is the proceeds of the recovery, the proceeding for its distribution is not governed by the general rules applicable to the settlement of estates, but is a special proceeding, provided for by sections 2720 and 1903, Code Civ. Pro., and the jurisdiction of the surrogate is governed and defined by the terms of those sections and to making the decree therein provided for. The money so received does not become general assets of the estate; it is not subject to the payment of the debts of the deceased nor to the ordinary

rules applicable to the settlement and administration of the estates of deceased persons. *Stuber v. McEntee*, 142 N. Y. 200; *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940.

The cause of action is not one in relation to the estate of the deceased and is not for the benefit of persons interested in such estate as creditors or otherwise, but the representative acts solely as trustee for the specified beneficiaries for whose exclusive use the recovery may be had. *Matter of McCullough*, 18 Misc. Rep. 721, 43 N. Y. Supp. 968; *Hegerich v. Keddie*, 99 N. Y. 258; rev'g, 32 Hun, 141; *Matter of McDonald*, 51 Misc. Rep. 318.

Who may maintain action.

The executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death.

From § 1902, Code Civ. Pro.

The cause of action accrues at the date of granting of letters to the representative. *Crapo v. City of Syracuse*, 183 N. Y. 395; rev'g, 98 App. Div. 376.

The action may be maintained for the benefit of alien nonresident next of kin. *Tanas v. Municipal G. Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053; *Alfson v. The Bush Co.*, 97 App. Div. 632, 35 Civ. Pro. Rep. 104; aff'd, 182 N. Y. 393.

Where the representative dies, his successor should be appointed to continue the action, and such right does not pass to the executor or administrator of the deceased representative. *Hodges v. Webber*, 65 App. Div. 170, 72 N. Y. Supp. 508.

An ancillary executor may maintain an action in this State. *Lang v. Houston, etc., R. R. Co.*, 75 Hun, 151, 58 N. Y. St. Repr. 594, 27 N. Y. Supp. 90; aff'd, 144 N. Y. 717.

Abatement.

A sole next of kin of the person killed having been appointed administrator and died — *held*, that the action for damages could

be continued for the benefit of the estate of said sole next of kin, and that the damages when recovered would be part of his estate. *Meekin v. B. H. R. R. Co.*, 164 N. Y. 145; aff'g, 51 App. Div. 1, 64 N. Y. Supp. 291.

An unmarried man was killed. His father was appointed administrator and died. An administrator *de bonis non* was then appointed and was substituted as plaintiff. The trial court dismissed the complaint on the ground that the cause of action abated on the death of the father. 20 Misc. Rep. 63, 44 N. Y. Supp. 430. On appeal there was a reversal. *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940. The Court of Appeals dismissed for lack of jurisdiction. 160 N. Y. 571.

Non-resident killed in another state. See ¶¶ 19, 82.

When the deceased and all persons entitled to recover were residents of Canada, the law of Pennsylvania gives them no right of action, and therefore no action therefor can be maintained in this State, the deceased having been killed in Pennsylvania. *Gurofsky v. Lehigh V. R. R. Co.*, 121 App. Div. 126.

Our courts will not take jurisdiction of such an action where the accident happened in another State to a resident of that State and the defendant is a foreign corporation. *Pietraroia v. N. J. & H. R. R. & F. Co.*, 131 App. Div. 829.

Administrator may supersede executor.

When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

From § 1902, Code Civ. Pro.

Administrator may be appointed although the person died leaving a will.

This section makes a peculiar and unusual rule, namely, that in the case specified, an administrator may be appointed although the deceased person died leaving a will which has been duly proved, and the executor has qualified thereunder.

The reason for this is that the executor does not represent the

persons who take the damages under this special act, as they are no part of the estate of the deceased, and therefore if he refuses to prosecute the action for the benefit of such persons, they may have an administrator appointed for such purpose. See also § 2592, ¶ 87.

Security for costs. See ¶ 157.

Where the administrator and all the next of kin are nonresidents and there are no assets in the State, security for costs will be required. *Meany v. Post & McCord*, 117 App. Div. 563.

Where an administrator brings an action to recover damages for causing the death of the intestate and is defeated and a judgment for costs is given against him, such judgment is not obtained in an action relating to the estate of decedent and no execution can be issued. *Matter of McCullough*, 18 Misc. Rep. 721, 43 N. Y. Supp. 968.

Order for compromise.

An order for compromise was not set aside on application of a child born after the widow-administratrix had procured the order and received the money. *Matter of Anderson*, 84 App. Div. 550, 82 N. Y. Supp. 763.

After a compromise is agreed upon there is no reason why the attorney for the defendant should not apply for the order, but in such a case, there must be proof other than his affidavit of the fairness of the settlement. *Matter of Stanley*, 62 Misc. Rep. 593.

¶ 418 Recovery Not Assets; Distribution of Recovery.

The recovery is not subject to the payment of the debts of the deceased nor to the ordinary rules applicable to the settlement and administration of the estates of deceased persons. The damages are not general assets of an estate of a deceased person in the hands of an executor or administrator and subject to his control, but are exclusively for the benefit of the decedent's husband or wife and next of kin. *Stuber v. McEntee*, 142 N. Y. 200; rev'g, 19 N. Y. Supp. 900.

Such residue is not liable for the debts of the deceased, and

apparently no set-off to the surviving husband or wife or minor children can be made, since the damages are not considered general assets of the estate subject to the general course of administration.

The cause of action thereby given is not to the estate of the deceased person, but to his or her representative as trustee, not for purposes of general administration, but for the exclusive use of specified beneficiaries. *Hegerich v. Keddie*, 99 N. Y. 258.

Where there is any other personal property than the recovery, the usual practice must be followed and that property must be distributed in the usual way and is liable for the debts of the deceased.

Where the only property is the recovery none of the reasons for delaying distribution in the ordinary cases can apply.

Creditors are not entitled to notice to present claims, and as the fund is in the hands of the administrator in cash, and is not in the hands of the administrator as the representative of the estate, but solely as a trustee for the next of kin, there seems to be no reason why distribution should not be made at once.

The petition should show that no other property has come to the hands of the administrator; that the expenses of the action and the funeral expenses have been paid, or if they have not been paid, the names of the parties who furnished them.

The names of the husband and wife, if any, and the next of kin entitled to share in the fund.

The name of the surety or sureties of the administrator.

Jurisdiction is acquired of these persons either by service of citation or by waiver, and distribution may be ordered in the usual manner.

Special proceeding for judicial settlement of account.

Before the revision there was no regularly provided special proceeding for the judicial settlement of the account of an executor or administrator who had taken limited letters for the prosecution of such an action, but such settlement was had under the general provisions for judicial settlements, although they were

not well adapted to the conditions of such settlement. The revision of 1914 added a new section which deals specially with this subject.

Judicial settlement where recovery has been had in negligence action.

Where limited letters testamentary or of administration have been granted for the prosecution of a cause of action, and a judgment or compromise thereof has been obtained and the proceeds are ready to be paid over; and where such recovery is not a part of the estate of the deceased but goes by special provision of law to designated persons or classes of persons; such executor or administrator may at any time file a petition for the judicial settlement of his account relating to such fund, and upon the return of a citation or upon the waiver of all the parties interested, if of full age and competent, the surrogate may take and settle such account, and direct payment to the parties entitled according to their respective rights and interests; and upon filing receipts for such payments the party paying the money and such executor or administrator shall be discharged from all further liability as to such cause of action and such fund. Where such recovery has been had and the amount thereof paid to the executor or administrator, he may in like manner have a judicial settlement of his account relating to such fund, at any time, and a decree made discharging him from further liability concerning the same.

§ 2720, Code Civ. Pro.

Effect of revision. New section.

This new section provides two courses for a representative to follow who has taken limited letters for the purpose of prosecuting an action for the negligent killing of a testator or intestate.

The usual practice has been to apply for the removal of the restriction contained in the letters, and after giving a proper bond, receive authority to collect the amount of the judgment or offer by way of compromise.

Under this new section such additional bond may be dispensed with, by a direction that payment be made directly to the persons entitled to the recovery.

Where a judgment or compromise has been obtained, the executor or administrator may now apply for a judicial settlement of his account relating to such fund, before the restriction is removed and before he has received the proceeds. Upon this application he cites his sureties, the undertaker, his attorney, and all persons interested in the fund. The rights of all the parties are

then shown and established, and the decree will direct the person or corporation paying the money for settlement, or to satisfy the judgment, to pay the various sums directly to the persons entitled thereto. In many instances the debtor is very glad himself to see that the money is properly distributed.

Upon filing the receipts for the payments so made under the decree, the debtor and the representative are discharged.

This proceeding makes it unnecessary to incur the trouble and expense of filing an additional bond, and enables an expeditious settlement to be made and a discharge had as to such fund.

The second proceeding authorized by this section follows the former method of settlement, and contemplates that the application has been made to remove the restriction of the letters, and an additional bond given thereupon.

It then provides for a judicial settlement of the account of the representative as to that fund, and a decree directing payment of the same to the parties entitled.

The parties who are entitled to share in the distribution are specified in section 1903, Code Civ. Pro.

¶ 419 Distribution of Recovery.

The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provision, to wit: In case the decedent shall have left him surviving a wife, or a husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband. The plaintiff may deduct from the recovery the reasonable expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper.

§ 1903, Code Civ. Pro.

The term "next of kin," as used in the foregoing section, has the meaning specified in section 1870 of this act, except if decedent leaves surviving a father and mother, but no widow, child or descendant, it shall mean both the father and the mother.

§ 1905, Code Civ. Pro.

Section 1903, Code Civ. Pro., controls as to distribution over any interference drawn from section 1904, Code Civ. Pro. *Snedeker v. Snedeker*, 47 App. Div. 471, 63 N. Y. Supp. 580; aff'd, 164 N. Y. 58.

Effect of divorce.

A divorce granted in another State without personal service of process, etc., does not deprive a husband of right to share in damages recovered from death of wife. *Matter of De Garamo*, 86 Hun, 390, 67 N. Y. St. Repr. 215, 33 N. Y. Supp. 502.

Under which state law distribution shall be made.

Letters issued in New York State and ancillary letters issued in Ohio where deceased was killed. Distribution under statute of Ohio. *Matter of De Garamo*, 86 Hun, 390, 67 N. Y. St. Repr. 215, 33 N. Y. Supp. 502.

Allowances for expenses of the action, and for funeral expenses.

Where an objection is made to the allowance of certain items claimed as expenses of the action, the surrogate may try and determine such objections.

Argument is hardly necessary to establish the principle that a representative of an estate, who maintains such an action, should be credited with attorneys' fees, disbursements, and witness' fees, together with reasonable compensation for expert witnesses, where they are required, as well as with payment for all other work, labor, and services of whatever nature they may be, so long as they are incurred in good faith, under a reasonable supposition that the chances of success in the lawsuit would be enhanced by their employment. Without a reasonable interpretation of this rule, representatives of estates would run personal risk of becoming chargeable with expenses which they in many instances properly deemed necessary to be rendered in accomplishing a successful termination of the litigation, and were such risks apparent it might easily lead to the imperfect preparation and trial of such cases and an incomplete protection of the rights of the next of kin, who would be entitled, under section 1903 of the Code of

Civil Procedure, to share in the proceeds. *Matter of Snedeker*, 95, App. Div. 149, 88 N. Y. Supp. 847.

Allowance of \$1,000 made for services of a physician who was a most important witness. *Matter of Snedeker*, 95 App. Div. 149, 88 N. Y. Supp. 847.

The Court of Appeals in *Lee v. Vacuum Oil Co.* (126 N. Y. 579-587) made this remark concerning the relation of the recovery to the attorney charges in this class of cases: "They (the attorneys) now have recourse to an ample fund provided by the settlement for the payment of their lawful charges."

In *Lee v. Van Voorhis* (78 Hun, 575, 61 N. Y. St. Repr. 220; aff'd, 145 N. Y. 603), the court said: "And section 1903 provides that the amount of his (the attorney's) claim shall be deducted from the recovery by the administrator."

The damages recovered for a death are upon a distinct and separate cause of action from one for personal injuries, and a contract relating to the latter cause of action will not be enforced against the proceeds of the former. *Matter of Carrig*, 36 Misc. Rep. 612, 73 N. Y. Supp. 1123.

An administrator may make an agreement with an attorney for a contingent fee, and if the same is fair and reasonable such agreement will be carried out by the court, and the attorney has a lien upon the fund for its recovery. *Lee v. Van Voorhis*, 78 Hun, 575, 61 N. Y. St. Repr. 220; aff'd, 145 N. Y. 603; *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514.

Contract by attorney with guardian for contingent fee.

Where the guardian has brought an action in behalf of the ward, and has made a contract with his attorney for a contingent fee, such contract must be submitted to the Supreme Court and the contract approved, or the allowance fixed in accordance with section 474 of the Judiciary Law.

Where application is made to the court by attorney to fix the allowance, a contract apparently free from fraud need not be considered binding upon the court. *Matter of Frieman*, 136 App. Div. 750; aff'd, 199 N. Y. 537.

Allowance for funeral expenses of deceased.

“By this section (1903) the damages recovered, while not subject to payment of the debts of the deceased and the general expenses of administration, are charged with the expenses of the action, the reasonable funeral expenses of the deceased, and the commissions of plaintiff on the residue.” *Alfson v. Bush Co.*, 182 N. Y. 393, 397.

The surrogate has jurisdiction to direct the allowance and payment from the fund of a claim for funeral expenses of the deceased even when the administrator refuses to pay it. *Matter of McDonald*, 51 Misc. Rep. 320.

Damages are now assets for the payment of funeral expenses, and an execution may issue against the representative upon a judgment received therefor. *Matter of McDermott*, 49 Misc. Rep. 402.

Payment of share of infant.

An administrator has no right to pay a distributive share to a general guardian unless so directed by the surrogate.

The fact that the distributive share is part of the proceeds of a judgment for damages recovered for the death of the father does not change the rule. *Lowman v. Elmira, C. & N. R. R. Co.*, 85 Hun, 188, 32 N. Y. Supp. 579, 65 N. Y. St. Repr. 723; aff'd, 154 N. Y. 765.

Death before September 1, 1911.

By an amendment taking effect September 1, 1911, the husband or wife surviving takes all the recovery if no children survive.

The deceased left a widow and a father — *held*, that the father shared with the widow in the recovery. *Snedeker v. Snedeker*, 164 N. Y. 59; aff'g, 47 App. Div. 471, 63 N. Y. Supp. 580.

Where damages are recovered for the death of a wife who leaves no descendants, such damages belong to the husband. *Austin v. Met. St. R. R. Co.*, 108 App. Div. 249.

Recovery and distribution under United States statute.

Where the accident happened in this State and the deceased resided here, our court refused to consider that the distribution of the recovery was controlled by the U. S. statute. *Matter of Taylor*, 144 App. Div. 634; aff'd, 204 N. Y. 135.

¶ 420 Representative May Procure Determination of His Claim Against the Deceased.

Under chapter 460, Laws of 1837, it was held that the representative might institute a special proceeding at any time for the trial and determination of his claim against the deceased. Subsequently the act of 1837 was repealed, and it was then held in *Matter of Ryder* (129 N. Y. 640), that there was then no provision for the trial of a claim made by the representative against the deceased, except upon the judicial settlement as provided in the section of the Code now known as section 2731. Later section 2719, Code Civ. Pro., was amended by inserting therein the language of the act of 1837 upon the subject (chap. 686, L. 1893), and thereafter it was held in *Matter of Marcellus* (165 N. Y. 70), that such amendment restored the jurisdiction of the surrogate to entertain the proceeding at any time and that the earlier cases construing the law of 1837 became applicable.

Trial of Claim of Representative Against the Estate.

Before the claim of the administrator can be paid it must be proved to and allowed by the Surrogate. §§ 2679, 2682, Code Civ. Pro. That means that it must be established by legal proof. It cannot, therefore, be proved by the testimony of the administrator himself where objection under section 829, Code Civ. Pro., is duly made. *Matter of Porter*, 60 Misc. Rep. 504; § 829, Code Civ. Pro.; *Jacques v. Elmore*, 7 Hun, 675; *Matter of Kelly*, 1 Tuck. 28. Much less can it be proved by his affidavit, taken under the provisions of law relating to verification of claims. *Williams v. Purdy*, 6 Paige, 166; *Clarke v. Clarke*, 8 id. 152; *Matter of Smith*, 75 App. Div. 339. There is no reason for claiming that no

proof need be offered as against parties not appearing in answer to the citation. The statute is explicit and makes no such exception. The fact that the parties cited do not appear does not dispense with the proof; it only enables the executor or administrator to proceed with his proof *ex parte*. *Kellett v. Rathbun*, 4 Paige, 102; *Keller v. Stuck*, 4 Redf. 295.

The validity of the debt may be admitted by all the parties interested, if of full age, and in such a case, the court would be justified in allowing the claim without formal proof being made, provided it was satisfied as to its validity. *Ledyard v. Bull*, 119 N. Y. 62.

A representative shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate, and it shall not have preference over others of the same class.

From § 2682, Code Civ. Pro.

Determination of issues arising between representative and the estate; suspension of statute of limitations in certain cases.

On the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties, respecting property alleged to belong to the estate, but to which the accounting party lays claim individually; or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must be tried and determined in the same manner as any other issue arising in the surrogate's court. From the death of the decedent until the first judicial settlement of the account of the executor or administrator, the running of the statute of limitations against a debt due from the decedent to the accounting party, or any other cause of action in favor of the latter against the decedent, is suspended, unless the accounting party was appointed on the revocation of former letters issued to another person, in which case the running of the statute is so suspended from the grant of letters to him until the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator, the statute of limitations begins again to run against a debt due to him from the decedent, or any other cause of action in his favor against the decedent.

§ 2679, Code Civ. Pro.

For a very exhaustive study of this section as it existed before the revision by Mr. Surrogate Fowler, see *Matter of Hoffman*, N. Y. Law Jour., July 8, 1914.

Where a question arises on judicial settlement whether a bank deposit is the property of the executor or of the estate the surrogate may determine the issue. *Matter of Rose*, 35 Misc. Rep. 21, 71 N. Y. Supp. 172; aff'd, 75 App. Div. 615, 176 N. Y. 587.

Equitable jurisdiction.

In the absence of any necessity for relief of a kind specially administered in a court of equity, it can make little difference whether the just determination of the questions involved depends upon legal or equitable principles. The direction of the Legislature that the "contest must be tried and determined" by the surrogate carries with it, as a necessary inference, that the controlling rules of substantial justice shall be applied by the surrogate, and that he is vested with all power necessary for that purpose. *Sexton v. Sexton*, 64 App. Div. 385; aff'd, 174 N. Y. 510; *Neilley v. Neilley*, 89 id. 352; *Boughton v. Flint*, 74 id. 476; *Kyle v. Kyle*, 67 id. 400; *Matter of Ammarell*, 38 Misc. Rep. 399; *Matter of Archer*, 51 id. 261.

This section is not applicable to the claim of a general guardian against his ward. *Matter of Tyndall*, 48 Misc. Rep. 39.

This section applies to temporary administrators, and the surrogate may try upon judicial settlement the claim of the temporary administrator against the estate. *Matter of Eisner*, 5 Dem. 383, 8 N. Y. St. Repr. 748.

A claim of ownership made by the representative, does not make him liable as in conversion, for he has the right to make such claim and have its merits tried. If the result of making the claim is to lose collection of the security, the claimant may be made liable therefor. *Matter of Niles*, 142 App. Div. 198.

¶ 421 Claim of Executor in Which Others May be Interested.

The surrogate upon an accounting by the personal representatives of a deceased executor may determine the validity of a claim of such deceased executor against the estate of testator. *Matter of Cooper*, 6 Misc. Rep. 501, 57 N. Y. St. Repr. 704, 27 N. Y. Supp. 425.

Claim of husband who was also executor.

Surrogate has jurisdiction to try and determine the disputed claim of an executor against the estate. A husband during his life had received money belonging to his wife and had not paid it over. *Boughton v. Flint*, 74 N. Y. 476.

Where claimant is executor of two estates.

The claim of an executor or administrator of one estate against another estate of which he is also executor or administrator may be proved under this section as though it were such person's individual claim. *Neilley v. Neilley*, 89 N. Y. 352.

Claim of usury.

An executor who owed the deceased a note claimed credit for it on the ground that the note was void for usury. The surrogate tried the question. *Matter of Consalus*, 95 N. Y. 340.

Assignee of claims.

Where an executor having a claim against the estate assigns it, the assignee may proceed as any other creditor and is not confined in his remedy to section 2679, Code Civ. Pro. *Snyder v. Snyder*, 96 N. Y. 88.

Claim of executor in which others are interested.

Claim of executor in which other persons were interested, and he had acquired an additional interest by assignment—*held*, that the surrogate had power to try the claim. *Shakespeare v. Markham*, 72 N. Y. 400.

Surrogate has jurisdiction to hear and determine any and all claims in which executor or administrator is interested even though he be not the sole party interested. *Shakespeare v. Markham*, 72 N. Y. 400.

Statute of Limitations.

Any person interested may set up the Statute of Limitations against the claim of the representative. *Burnett v. Noble*, 5 Redf. 69.

Claim of title by gift.

Where the representative has filed an account setting forth the personal property of the deceased, and upon the hearing claims all of such property as his by gift and delivery thereof before the death of deceased, the surrogate has jurisdiction to try the issue upon objections filed. *Matter of Cavanagh*, 121 App. Div. 200, 105 N. Y. Supp. 850; *Sexton v. Sexton*, 64 App. Div. 385, 72 N. Y. Supp. 213; *aff'd*, 174 N. Y. 516.

Partnership claim. See ¶ 202.

An executor who was one of a firm of which deceased was a member cannot have tried on the judicial settlement the claim of such partnership against the deceased on the ground that it is a debt owing to the executor. *Matter of Jones*, 2 Misc. Rep. 221, 54 N. Y. St. Repr. 273, 23 N. Y. Supp. 767.

Under this section a surviving partner who is also executor may be compelled to account for the interest of the deceased in the partnership property. *Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879.

¶ 422 Proof Required.

The verified petition of the executor on an accounting in which he sets up the making of a note from deceased to himself is insufficient to support his claim on a trial of the validity of his claim. *Weeks v. Washburn*, 23 App. Div. 151, 48 N. Y. Supp. 908.

A verified claim is no proof of the claim, and the verification is incompetent under section 829, Code Civ. Pro. *Matter of Smith*, 75 App. Div. 341, 78 N. Y. Supp. 130.

Where on the trial of a claim against the estate it is shown that a subsequent dealing existed in which the pretended creditor was to some extent a debtor and that he never once presented his claims in reduction of his debt, the weight of suspicion becomes very great and justifies a demand for distinct and definite proof and the clearest indications of honesty and fairness. *Kearney v. McKeon*, 85 N. Y. 136. See ¶ 437.

There is no presumption in favor of the validity of the claim of the representative, but on the contrary the law requires that the claim should be supported by clear and satisfactory evidence. *Matter of Cozine*, 113 App. Div. 22; *Matter of Primmer*, 49 Misc. Rep. 413.

Burden of proof.

The burden is upon the representative to prove his claim by clear and satisfactory evidence. *Matter of Cozine*, 113 App. Div. 22.

Objection by creditor.

Creditors cannot object to testimony by the representative in proving his own claim where there are sufficient assets to pay all creditors in full. *Matter of Brodhead (Van Buren)*, 19 Misc. Rep. 373, 44 N. Y. Supp. 357.

Reference of claim made by representative.

A claim to be determined in favor of the representative may be referred. *Boughton v. Flint*, 74 N. Y. 476.

Evidence of personal transactions and communications where objection under § 829 is made.

An administrator cannot testify as to conversations or transactions with deceased intestate in proof of his own claim. *Matter of Neil*, 35 Misc. Rep. 254, 71 N. Y. Supp. 840.

Executor claimed under a note given to him by deceased and executed by mark in presence of a witness — *held*, that the executor could not testify to the execution of the note, or that the name of the witness subscribed to it was her signature, or that she subscribed her name at the request of the testatrix. *Weeks v. Washburn*, 23 App. Div. 151, 48 N. Y. Supp. 908.

Where the executrix seeks to prove a note held by her against the deceased, and there is no proof of any other method of delivery, her own testimony that she had possession of the note is incompetent. *Matter of Knibbs*, 108 App. Div. 134.

In *Matter of Smith* (75 App. Div. 339), the allowance was by the surrogate upon the verified claim of the executor with

no other proof. This was reversed, the court saying that the executor's verification was incompetent under section 829, Code Civ. Pro.

Evidence of representative when no objection is taken.

An administrator when no objection is made may make proof of his own claim, and if other facts assist in proving it the claim may be allowed. *Matter of Brodhead* (*Van Buren*), 19 Misc. Rep. 373, 44 N. Y. Supp. 357.

In *Matter of Cozine* (113 App. Div. 22), the court sustained the allowance of a claim proved by testimony of the administrator expressly putting it upon the statement of counsel that the question of the competency of the evidence was not to be considered.

Where the claim is set out in the account duly filed, and all parties default and no objection to the testimony of the representative under section 829, Code Civ. Pro., is taken, such evidence may be received and, if proper, the claim allowed. *Matter of Porter*, 60 Misc. Rep. 504.

¶ 423 Determination of Adverse Claim to Personal Property in the Hands of the Representative Claimed by Him to Belong to the Estate.

Where personal property has come to the hands of the representative and a claim to that property is set up by some other person the surrogate has jurisdiction to determine the question between the representative and the claimant provided only that the claimant is a party to the proceeding.

In order that such an issue may be raised in a manner to give the surrogate jurisdiction the accounting party should charge himself in his account with the property claimed by him to belong to the estate, for if he simply states in his account that there is such property and that it is claimed by some other person the representative will not raise any issue respecting the title to the property. The Surrogate's Court has jurisdiction

to determine with what property the representative shall be charged as being the property of the deceased, and when the representative sets up in his account that certain property belongs to the estate, it raises the issue of title as against every party to the proceeding. Under the enlarged jurisdiction of the Surrogate's Court given by the amendments of 1914 the court has jurisdiction to determine all questions which are necessary to be determined to make a complete decree.

Jurisdiction when a gift of assets is claimed.

Surrogate has jurisdiction to determine on an accounting whether there was a gift *causa mortis* where the alleged donee is a party to the proceeding as a next of kin. *Fowler v. Lockwood*, 3 Redf. 465.

Where a trust by deposit in bank was claimed, it was held that as between the executrix who had received the trust money and the beneficiary of the trust funds, all being parties to the accounting, the surrogate could determine the question as to the validity of the trust. *Matter of Pearson (George)*, 21 N. Y. St. Repr. 128, 3 N. Y. Supp. 426.

On an accounting by an administrator the surrogate may determine as between the administrator and a next of kin whether the deceased created a trust fund by deposit in bank for the benefit of such next of kin. *Matter of Collyer*, 4 Dem. 24.

Relating to gift; no jurisdiction.

No jurisdiction to determine whether the deceased created a trust by a bank deposit as between the administrator and such claimants where they are not parties to the accounting. *Matter of Collyer*, 4 Dem. 24.

Burden of proof.

The burden is upon the objector to show that the property is assets of the deceased. Having once shown ownership in the deceased a gift or sale will not be presumed. *Matter of Perry*, 129 App. Div. 587.

¶ 424 General Requisites of a Valid Gift.

The essential elements of any gift are:

“First. Intent to vest the title of the thing given in the donee.

“Second. Delivery.

“Third. Acceptance by the donee. *Beaver v. Beaver*, 117 N. Y. 421; rev’g, 52 Hun, 258.”

The delivery may be actual and manual, or it may be symbolic and constructive.

Proof of delivery.

Bonds were delivered to a third person with instruction for delivery to the donee. The donor had previously declared her purpose to give the donee about the amount of such bonds and afterward declared that she had done so. The bonds were delivered after the donor’s death — *held*, a valid gift. *Bump v. Pratt*, 84 Hun, 201, 65 N. Y. St. Repr. 739, 32 N. Y. Supp. 538.

A bond and mortgage assigned but not delivered to claimant — *held*, to belong to the deceased. *Wadd v. Hazelton*, 137 N. Y. 215; rev’g, 62 Hun, 602, 17 N. Y. Supp. 410.

Upon delivery of a bond and mortgage as a gift, the fact that they were handed back for safekeeping did not affect the gift. *Gannon v. McGuire*, 160 N. Y. 476; rev’g, 22 App. Div. 43, 47 N. Y. Supp. 870.

Delivery is established by evidence that testator had said that he wanted plaintiff to have the notes; that soon afterward they were in plaintiff’s possession and were retained by her as owner with testator’s knowledge to the time of his death. *Rix v. Hunt*, 16 App. Div. 540, 44 N. Y. Supp. 988.

The delivery of a bank-book and an order for the fund, though not presented until after the donor’s death, is a valid gift or may be sustained as payment since the order is in the nature of a check. *McGuire v. Murphy*, 107 App. Div. 104.

An insurance policy and assignment being sent to the company for its approval and entry on its books — and returned — *held*, to be a good delivery to constitute a gift. *Hurlbut v. Hurlbut*, 49 Hun, 189, 17 N. Y. St. Repr. 31, 1 N. Y. Supp. 854.

A bill of sale executed by deceased and found among his papers after his death, there being no proof of delivery or change of possession of the property, is not valid. *Bryant v. Bryant*, 42 N. Y. 11.

Deceased gave his sons checks payable four days after his death and also gave them his bank-books; but used language implying that he did not intend an absolute present gift — *held*, that there was no valid gift of the money. *Curry v. Powers*, 70 N. Y. 212.

Symbolical delivery.

“While there is no direct evidence of an actual manual delivery of the money by Rosina Stumpf to her son Frank Stumpf, the declaratory paper shows the intention to make the gift, and that the gift has been made. There was a sufficient constructive or symbolical delivery and the paper is evidence of a transfer of the title from Rosina Stumpf to the defendant. *Beaver v. Beaver*, 117 N. Y. 428; *McGavic v. Cossum*, 72 App. Div. 35, 76 N. Y. Supp. 305. The evidence of the gift is sufficient, considering the confidential relations between mother and son and the rule that the evidence under such circumstances must be ‘scrutinized with the extremest vigilance.’” *Gick v. Stumpf*, 53 Misc. Rep. 83.

Declarations of deceased as to gift.

Declarations of deceased, either written or oral, made after the time of an alleged gift cannot be received against the validity of the gift, except when there has been some evidence of the condition of mind of the deceased, and such declarations are then competent as bearing only on such condition. *Gick v. Stumpf*, 204 N. Y. 413; rev’g, 134 App. Div. 910.

Valid gift may be made although the use of the property be retained.

Testator signed a paper reading as follows, and annexed it to certificates of stock and delivered them:

“To whom It may Concern and Especially to John C. King, of Rochester, N. Y.

“Take Notice that I hereby declare and state that I hold the stock consisting of Fifty Shares of the National Lead Co. Stock,

Preferred, in Trust for my daughter, Catherine J. King, to be delivered to her at my death.

“ I, however, retaining the right during my lifetime of drawing the dividends thereon. The certificates for said stock are annexed to this paper and direct you to hand said certificates to her at my death.”

The court said:

“ The essence of a gift, even though it be in the form of a trust created by the donor, is delivery (*Martin v. Funk*, 75 N. Y. 134, 137; *Brown v. Spohr*, 180 id. 201, 209), and that was fulfilled in the present instance.

“ Eagan, the testator, executed an assignment of the stock certificates in blank. He attached to them a memorandum, signed and witnessed by him, denoting the ownership of Mrs. King and his trusteeship. He delivered the certificates and memorandum to Mrs. King, the donee. There was, therefore, an unqualified delivery to her.

“ His retention of the dividends gave him no right to recall the transfer. The transaction is no different than if he had executed and delivered a conveyance of real estate, retaining its use or income during his life. The title would have passed absolutely to the grantee or donee.” *Matter of King*, 115 App. Div. 751.

Effect of redelivery of subject of the gift.

The delivery required to make a good gift may be in accordance with the nature of the thing given, provided the circumstances show that the donor intended to divest himself of title and possession, but after the gift is made complete by delivery, it is not necessary that the donee should retain possession of the property for it may be redelivered to the donor as the agent of the donee for safekeeping. The mere custody of the property after a complete gift *in præsentia* has been made is subject to explanation, and its chief importance is its bearing upon the question whether there was an executed gift. *Gannon v. McGuire*, 160 N. Y. 476.

Bonds or Other Securities in Marked Envelope or Package.

Bonds found in safe deposit box of deceased, held by a rubber band to an envelope containing property of the donee — *held* not to have been delivered. *Gegan v. Union Trust Co.*, 129 App. Div. 184; *Matter of Van Alstyne*, 207 N. Y. 298.

Securities put into envelopes and declared to be for certain persons — but still retained in a safe to which the alleged donor has access — *held*, not to be sufficient evidence of gift. *Trow v. Shannon*, 78 N. Y. 446.

Bonds put into envelopes and marked with the names of the intended donees and a statement that certain bonds therein belonged to such persons, but reserving the interest to himself, are not thereby validly given to the persons named. *Young v. Young*, 80 N. Y. 422.

Bonds found in the safe deposit box of the deceased, in an envelope marked: "The property of " etc. — *held* not to have been delivered. *Beck v. Staudt*, 149 App. Div. 35.

Action to impress trust upon securities.

Securities found in safe deposit box of deceased in envelope marked as property of another — suit in equity to impress trust thereon — held that residuary legatees should be made parties. *Beck v. Staudt*, 140 App. Div. 481.

Gift of Stocks — Stamp Act.

In making gifts of shares of stock the Tax Law which requires the payment of a tax on all transfers of stock before evidence of such transfer can be given in court (Tax Law, § 270) should be observed.

The question has arisen whether such gifts are susceptible of being proved after the death of the donor where no stamp was affixed at the time of the gift and delivery (§ 278). This question was suggested in *Sheridan v. Tucker* (138 App. Div. 436), but not decided.

It arose again in *Bean v. Flint* (138 App. Div. 846; *aff'd*, 204 N. Y. 153), where it was decided that such a defense, to be avail-

able must be pleaded. But it was said in the course of the opinion that the failure to pay the tax at the time of delivery of the certificate was fatal to the right to recover the value thereof. In the case of *Mutual Life Ins. Co. v. Nicholas* (144 App. Div. 95), the doctrine of the *Bean* case was reiterated.

These cases were reluctantly followed in *Matter of Raleigh*, 75 Misc. Rep. 55.

¶ 425 Gifts as Between Husband and Wife. See ¶¶ 397, 427, 433.

In some instances the possession by husband and wife of personal property is deemed to be joint so that the survivor will take the whole title. But gifts may be made by one to the other so that absolute title will vest.

Matter of Holmes (79 App. Div. 264; aff'd, 176 N. Y. 603) was a case where the husband deposited his own money and gave the book to his wife. Thereafter she, being in poor health, wrote the bank asking them to "please fix this book so Mr. H. can draw it out as well as myself," whereupon the bank officer wrote in the book "W. S. H. may draw." It was held that the gift was valid and that the power to draw did not invalidate it.

While clear and convincing proof is required, it must be remembered that these transactions between husband and wife usually take place only in the presence of each other and that many witnesses cannot often be produced. *Matter of Reichert*, 38 Misc. Rep. 228.

The determination of the question between husband and wife depends upon the question whether the facts sustain a completed gift *in presenti inter vivos* by one or the other, and the one claiming the gift has the burden of establishing the facts by a preponderance of evidence. *Schneider v. Schneider*, 122 App. Div. 774.

Husband about to leave home puts bonds in box and leaves at bank, giving wife the key—held no gift. *Shuttleworth v. Winter*, 55 N. Y. 624.

¶ 426 Gifts Causa Mortis and Inter Vivos. See ¶ 433.

The most important distinction between a gift *causa mortis* and a gift *inter vivos* is that a gift *causa mortis* is revoked by the death of the donee before that of the donor. *Griswold v. Hart*, 142 App. Div. 106.

The rules to be applied in determining whether there has been a gift *causa mortis* have been set forth in numerous well-considered cases. For instance, because of the ease with which fraud can be practiced in cases of this kind, a party alleging a gift *causa mortis* is required to prove it by convincing, strong, and satisfactory evidence. Nothing is to be presumed either in favor of or against such a gift. *Devlin v. Bank*, 125 N. Y. 756, 26 N. E. 744. Furthermore, to establish a gift *causa mortis*, the defendant must show that it was made with a view to donor's death, that the donor died of his present ailment or peril, and that there was a delivery. Clear and convincing proof of the delivery to the donee of the very property claimed as a gift is absolutely requisite. *Davis v. Davis*, 104 N. Y. Supp. 824.

Deceased was about to have an operation on her ear, and it was alleged that she gave her bank-book to an entire stranger known to her only about four months, *held*, that it was not a gift *causa mortis*. *Conaghan v. Ger. Sav. Bank*, 104 N. Y. Supp. 829.

A gift *causa mortis* is not invalid because the donor did not die of the disease from which he apprehended death. *Ridden v. Thrall*, 125 N. Y. 572.

An aged man, about eighty, made a written assignment of twenty shares out of 120 of bank stock to a granddaughter and gave the same to his wife with directions to give said assignment to the granddaughter upon his death. *Held*, a valid gift *causa mortis*. *Grymes v. Hone*, 49 N. Y. 17.

S. had a certificate of deposit, and with intent to give the sum represented thereby, he drew a check on the bank, but did not deliver the certificate. *Held*, a valid gift. *Kurtz v. Smither*, 1 Dem. 399.

Choses in action may be transferred by delivery only, as a

gift *causa mortis*. *Bedell v. Carll*, 33 N. Y. 581; *Westerlo v. De Witt*, 36 id. 340.

Requisites are, contemplation of death, clearly expressed intent to give *in præsenti*, delivery of the subject-matter, and death of donor without revocation. *Champney v. Blanchard*, 39 N. Y. 111.

A valid gift is established by evidence that the donor several times stated that she had given the bank-book to the donee, and that shortly after the injury which caused her death, she handed the book to the donee, saying to the persons present that she gave it to her. *Callanan v. Clement*, 18 Misc. Rep. 621, 42 N. Y. Supp. 514; aff'd, 162 N. Y. 618.

A delivery is established where the donor, a few hours before her death, gave the donee her keys, stating that she wished the donee to have everything, and the donee in the presence of the donor unlocked her trunk and took therefrom a tin box containing the pass-book and carried it from the room. *Reynolds v. Reynolds*, 20 Misc. Rep. 254, 45 N. Y. Supp. 338.

Gifts Inter Vivos.

There is no doubt about the law as to what is necessary to constitute a valid gift *inter vivos*. It is a delivery by the donor of the subject of the gift, with intent to at once vest title to the thing given in the donee. *Gannon v. McGuire*, 160 N. Y. 476; *Picksley v. Starr*, 149 id. 432; *Callanan v. Clement*, 18 Misc. Rep. 621; S. C., 32 App. Div. 631; aff'd, 162 N. Y. 618. It is true after the gift has been perfected by delivery it is not necessary that the donee shall retain possession of the property, but it may be redelivered to the donor as the agent of the donee for safekeeping; but it is equally true that where the donor is dead, and the thing given was in his possession at the time of his death, the clearest evidence of the gift is required, and where the persons stood in a confidential relation at the time, then the burden is upon the donee to show the necessary facts to establish the gift. Thus, it was said in *Nesbit v. Lockman* (34 N. Y.

167): "Where persons standing in a confidential relation make bargains with or receive benefits from the persons for whom they are counsel, attorney, agent, or trustee, the transaction is scrutinized with the extremest vigilance and regarded with the utmost jealousy. The clearest evidence is required that there was no fraud, influence, or mistake; that the transaction was perfectly understood by the weaker party; and usually evidence is required that a third and disinterested person advised such party of all his rights. The presumption is against the propriety of the transaction, and the *onus* of establishing the gift or bargain to have been fair, voluntary, and well understood rests upon the party claiming, and this in addition to the evidence to be derived from the execution of the instrument conveying or assigning the property." See also *Barnard v. Gantz*, 140 N. Y. 249; *Case v. Case*, 49 Hun, 83; *Adee v. Hallett*, 3 App. Div. 308; *Kissam v. Squires*, 102 id. 536; *Bowron v. De Selding*, 105 id. 500.

It has been held that an alleged gift *inter vivos* or *causa mortis*, which is not asserted until after the death of the donor, should be supported by evidence of the highest probative force. Joint tenancy and survivorship incidental thereto are not favored in law or equity and never when any other deduction can be made. *Matter of Seigler*, 49 Misc. Rep. 191.

A husband executed mortgages and bonds to his wife without consideration — *held*, that the balance due upon the bonds after the sale of the real estate was not a valid claim against his estate. *Matter of James*, 146 N. Y. 78; *aff'g*, 78 Hun, 121.

The law is well established in this State that one who attempts to establish title through a gift *inter vivos* must do so by clear and conclusive evidence. As was said in *Matter of O'Connell* (33 App. Div. 483): "He who attempts to establish title to property through a gift *inter vivos* as against the estate of a decedent takes upon himself a heavy burden which he must support by evidence of great probative force, which clearly establishes every element of a valid gift, viz., that the decedent in-

tended to divest himself of the title in favor of the donee and accompanied his intent by a delivery of the subject-matter of the gift." *Matter of Schroeder*, 113 App. Div. 209.

A good gift is shown where the gift is absolute and the donee is put into such a position that he can give a good title, or where the securities are put into a safe-deposit box and the key given to the donee. *Matter of Spaulding*, 49 App. Div. 541; aff'g, 22 Misc. Rep. 420, 32 N. Y. Supp. 694; aff'd, 163 N. Y. 607; *Matter of Graves*, 52 Misc. Rep. 433.

Revoking gift.

While a gift *causa mortis* may be revoked during the lifetime of the giver, a gift *inter vivos* cannot be revoked.

"The gift, having been once completed, the donor is divested of dominion over the thing given and could not revoke the gift." *Cambreleng v. Graham*, 79 Hun, 247; *Little v. Willets*, 55 Barb. 125; *Gick v. Stumpf*, 53 Misc. Rep. 83.

¶ 427 Gift of Savings Bank-Books; Joint Deposits. See ¶¶ 194, 397.

The Legislature of 1907 amended the Banking Law in regard to the payment of money deposited in banks and trust companies in the name of a minor, or in trust by one person for another or in the joint names of two persons and to the survivor, and therein it was provided that payment made in accordance with the tenor of such deposits should be a valid payment and should release such bank or trust company.

These provisions were retained, somewhat amended, in the Banking Law, enacted in 1914. The section relating to banks follows, and a similar section (§ 198, ¶ 194) relates to trust companies.

Deposits of minors and trust deposits and deposits in the names of more than one person.

When any deposit shall be made by or in the name of any minor, the same shall be held for the exclusive right and benefit of such minor, and free from the control or lien of all other persons, except creditors, and shall be paid,

together with the interest thereon to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the bank. When any deposit shall be made by any person describing himself in making such deposit as trustee for another and no other or further notice of the existence and terms of a legal and valid trust than such description shall have been given in writing to the bank in the event of the death of the person so described as trustee, such deposit or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the deposit was thus stated to have been made. When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made, by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them; and such payment and the receipt or acquittance of the one to whom such payment is made, shall be a valid and sufficient release and discharge to said bank, for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of such joint tenants, not to pay such deposit in accordance with the terms thereof.

§ 148, Banking Law.

These provisions have helped to settle the law regarding deposits in trust, and in names of other persons, than the depositor. Such form of deposit is now used in many instances to transfer a bank deposit to the survivor without making a will or taking administration, and the system has been found to be efficient and simple.

The State Comptroller claims the right to tax such deposits as being made in contemplation of death, but is meeting with vigorous opposition in the courts.

The case of *Kelly v. Beers* has been litigated through many courts and has been decided by the Court of Appeals in 194 N. Y. 49; rev'g, 124 App. Div. 917. In this case the bank-book was written "K. V. B. or S. E. K. her daughter, or the survivor of them." The mother dying the daughter sued to recover the deposit as her own, and the court said:

"The possibility of so fixing a bank account that two persons shall be joint owners thereof during their mutual lives and the

survivor take upon the death of the other is so well established that we may assume and need not discuss it.

I think also it is so apparent that it must be conceded that the account in question on its face imports such joint ownership by appellant and the deceased with final sole ownership by survivorship.

It has been written, however, in various decisions that the mere form of the account in such a case as this will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another or to give to such another joint interest in or ownership of the deposit."

The trend of the later decisions seems to consider these cases not as gifts or attempted gifts, but in the light of the amendment to the banking laws as creating a joint tenancy with the right in the survivor to take the fund which remains on deposit at the death of either. See *Matter of Kline*, 65 Misc. Rep. 446.

However, in the case of *Bradt v. Bradt*, 143 App. Div. 863, the court decided upon the old theory, but with a very strong dissenting opinion.

Deposit before the enactment of this provision of the Banking Law, upheld as a joint deposit. *Bounette v. Malloy*, 53 App. Div. 73.

Gift of deposit by delivery of book.

If it is the intention of the alleged donor to give the bank-book into the keeping of the donee so that upon the death of the donor what was left in the bank should be the property of the donee, that would not be a valid gift. *Tyrrel v. Emigrant I. S. B.*, 77 App. Div. 131, 79 N. Y. Supp. 49.

Where a bank has paid the donee and is itself sued for the deposit, the donee is a competent witness to prove the gift. *Podmore v. Seamen's Bk.*, 35 Misc. Rep. 379, 71 N. Y. Supp. 1026.

There must be intention, either expressed in terms or to be implied from the nature of the transaction, to immediately transfer the title of the fund to the beneficiary, the acquisition of a

present right, not the promise of a future right. *Sullivan v. Sullivan*, 161 N. Y. 554; aff'g, 39 App. Div. 99, 56 N. Y. Supp. 693.

The delivery of an order upon the bank and of the bank-book is a good delivery and gift, and is not revoked by the death of the depositor before the presentation of the order and book. *McGuire v. Murphy*, 107 App. Div. 104; *Matter of Barefield*, 177 N. Y. 387; rev'g, 82 App. Div. 463, 81 N. Y. Supp. 843; which rev'd 36 Misc. Rep. 745, 74 N. Y. Supp. 472.

Effect of making a will giving deposits in bank.

It has been held that the making of a will by the mother after the bank deposit was so made, which will purported to deal with money in bank, did not annul the prior act.

Incompetency of claimant as witness.

Even though the possession of the books was claimed to have been had from a third person, the claimant cannot testify to that delivery, since even that is a personal transaction with the giver. *Clift v. Moses*, 112 N. Y. 426; *Richardson v. Emmett*, 170 id. 412; *O'Connor v. Ogdensburg Bank*, 51 App. Div. 70, 64 N. Y. Supp. 501; *Davis v. Davis*, 104 N. Y. Supp. 824.

No interested person can testify to anything learned through the senses from the deceased person as the Court of Appeals has now decided in *Griswold v. Hart* (205 N. Y. 384).

Invalid gifts.

Evidence not clear and convincing. *Matter of O'Connell*, 33 App. Div. 483, 53 N. Y. Supp. 748; *Bray v. O'Rourke*, 89 App. Div. 400, 85 N. Y. Supp. 907.

Deposits made by the owner of the money in her name and in that of another, as follows: "J. C., or daughter B. B.," in the absence of other evidence simply evidence of purpose by the depositor that they should be drawn out by either of the persons named, and such form of deposit does not constitute a gift. *Matter of Bolin*, 136 N. Y. 177.

C. S., or in case of her death to her niece C. S.—*held*, not valid. *Sullivan v. Sullivan*, 161 N. Y. 554; aff'g, 39 App. Div. 99, 56 N. Y. Supp. 693.

P. B. R., in event of my death, to P. R., not valid as a gift. *Matter of Rose*, 35 Misc. Rep. 21; aff'd, 75 App. Div. 615, 176 N. Y. 587.

M. E. or W. S., payable to either or survivor, no gift. *Matter of Seigler*, 49 Misc. Rep. 189.

Valid gifts.

H. V. A. or H. B. H., pay to either or survivor of either — held to make a *prima facie* gift. *Hallenbeck v. Hallenbeck*, 103 App. Div. 107; rev'g, 44 Misc. Rep. 109.

Evidence clear and convincing. *Matter of Swade*, 65 App. Div. 592, 72 N. Y. Supp. 1030.

Gift of deposit by adding another name.

Gift sought to be presumed from possession of bank-book written in name of depositor or her daughter, and from evidence of care and support given the mother by the claimant — held insufficient to constitute gift, since to constitute a gift there must have been an intent to give and a delivery. *Matter of Bolin*, 136 N. Y. 177.

Where the proof is that a deposit was made payable to the order of the depositor or another, and that it was so made with the intent to give said certificate to such other person in case he survived the depositor, no gift or trust is created. *Turnbull v. Turnbull*, 118 App. Div. 449.

The decision in *Wetherow v. Lord* (41 App. Div. 413), and that in *Farrelly v. Emig. Sav. Bank* (92 App. Div. 529; aff'd, 179 N. Y. 594), were written by the same judge and in nowise conflict. The affirmance of the latter case by the Court of Appeals may be taken to be a reaffirmance of the doctrine of the *Bolin* case.

CHAPTER LV.

Final Judicial Settlement, Continued; Proof of Claims for Services and of Notes and Checks; Competency of Witnesses.

- ¶ 428. Effect of failure to allow or reject a claim.
- ¶ 429. Proof of value of services.
- ¶ 430. Statute of Limitations.
- ¶ 431. Testimony as to personal transactions with deceased.
- ¶ 432. Claims by near relatives, presumption of gratuitous services.
- ¶ 433. Weight of evidence discussed.
- ¶ 434. Proof of notes and checks as debts.
- ¶ 435. Proof of consideration for note or check.
Inadequacy of consideration for contract.
- ¶ 436. Incompetency of witness under § 829.
- ¶ 437. Effect of subsequent dealings between same parties.

¶ 428 Trial of Claims on Judicial Settlement.

Effect of failure either to allow or reject a claim.

Generally speaking, it is the duty of the representative to allow or reject all debts presented, and, if he allows a debt, he should pay it before the judicial settlement if he has sufficient funds so that he may safely do so. But there may be circumstances under which the representative does not feel that he can pay the claim and does not feel that he ought to reject it. In such a case he may set out in his account that the claim has been presented, neither allowed nor rejected and not paid. He will then be required by the surrogate either to allow or reject it. *Matter of Brown*, 60 Misc. Rep. 35.

This course will generally result in an adjournment of the settlement, for the claimant has three months after rejection of a claim to bring action upon it in the Supreme Court. If however he is willing to have the claim tried before the Surrogate's Court, he may so consent, and by so doing will waive the right to an action, and the parties may proceed to trial. § 2681, ¶ 223.

Effect of allowance of claim.

Where the claim has been allowed, and either paid or not paid, the effect of such allowance is considered in paragraph 220. The proceedings upon the trial of a rejected claim are set forth in paragraph 223.

Burden of proof where statute of limitations apparently has run.

The *Warren* case (56 App. Div. 414), seems to hold that a claim, even though barred by the statute of limitations, when allowed by the administrator, should be treated as any other claim, not barred. *Matter of Knab*, 38 Misc. Rep. 717; see also *Matter of Nelson*, 63 Misc. Rep. 627.

Proof of nonpayment of claim.

Proof of the payment of a claim is a defense which the representative is required to make, and such proof is no part of the case of the claimant on the trial.

Testimony that the claim has not been paid is unnecessary, and when given by the claimant is incompetent. *Lerche v. Brasher*, 104 N. Y. 157; rev'g, 37 Hun, 385; *Brayman v. Stephens*, 79 Hun, 28, 61 N. Y. St. Repr. 204, 29 N. Y. Supp. 526.

Evidence of nonpayment is immaterial when offered by claimant in the first instance and an objection under section 829, Code Civ. Pro., is good. *Lerche v. Brasher*, 104 N. Y. 157; rev'g, 37 Hun, 385; *Alicanian v. Walton*, 14 App. Div. 199, 43 N. Y. Supp. 541; *Matter of Neil*, 35 Misc. Rep. 254, 71 N. Y. Supp. 840.

The burden of proving that a claimant was paid is upon the devisee where such claim affects the interest of the devisee. *Eagan v. Kergill*, 1 Dem. 464.

¶ 429 Proof of Value of Services.

The measure of value of services is what they were worth, not what they were worth to the alleged debtor. Where such debtor is dead, the claimant cannot give testimony as to the value, if the services were performed in the presence of the deceased. *Yates*

v. *Root*, 4 App. Div. 443, 74 N. Y. St. Repr. 156, 38 N. Y. Supp. 663.

Testimony of trained nurses as to value of household services, including ordinary care of a sick person, should not be allowed where such nurse says she does not know the value of domestic services, but judges by the value of services of trained nurses. *Weidman v. Thompson*, 53 App. Div. 24, 65 N. Y. Supp. 481.

Where the claim is for services and money expended in caring for a child, and no account was kept of money expended, evidence that it all ought to be worth \$9 a week is not sufficient as proof of value. *Blumert v. Hoes*, 127 App. Div. 547.

Nursing.

Where a person not a nurse of any kind takes care of a sick person, the value of such services is not measured by the wages paid nurses, but by the amount claimant was earning when she left her employ to perform such services. *Matter of Lannon*, 75 Misc. Rep. 66.

Additional services when under regular employment.

Where a person already under employment sues for additional compensation, it will be presumed that the wages paid covered all the services rendered which were within the scope of the employment. *Rose v. Leask (Hoagland)*, 124 App. Div. 799.

Presumption from regular employment.

There is a presumption against a claim for additional compensation when the claimant has been regularly paid for other services. *Reilly v. Burkelman*, 149 App. Div. 548.

Services of physician.

The financial condition of a patient does not alone affect the abstract question of the value of a physician's services, but it is a proper element entering into the question as to what charge, or what reduction in the charge, shall be made by him by reason of such financial condition. *Schoenberg v. Rose*, 145 N. Y. Supp. 831.

Books of account as evidence.

The rules governing the admission of a party's books for the purpose of sustaining his claim are stated as follows in *Vosburgh v. Thayer*, 12 Johns. 461, 462: "They ought not to be admitted where there are several charges, unless a foundation is first laid for their admission by proving that the party had no clerk; that some of the articles charged have been delivered; that the books produced are the account books of the party; and that he keeps fair and honest accounts — and this by those who have dealt and settled with him." And this rule, in substance, has been reaffirmed many times, and amongst others in the following cases: *Sickles v. Mather*, 20 Wend. 72, 32 Am. Dec. 521; *Beatty v. Clark*, 44 Hun, 126; *Dooley v. Moan*, 57 id. 535, 11 N. Y. Supp. 239; *Foster v. Coleman*, 1 E. D. Smith, 86; *Tomlinson v. Barst*, 30 Barb. 42; *Van Name v. Barber*, 115 App. Div. 593, 100 N. Y. Supp. 987; *Swan v. Warner*, 90 N. E. Rep. 430.

Book of account showing claim against estate of deceased allowed in evidence on showing that persons had settled from the books or from statements of copies of the account. A bookkeeper held not to be a clerk. *Hurley v. Macey*, 94 App. Div. 9, 87 N. Y. Supp. 924.

Proof of agency.

The issue of agency may be established by acts, declarations, and conduct of the principal and agent, and it may also be inferred from circumstances. The manner in which a party treats one who apparently acts as his agent and holds him up before third parties will in many cases be sufficient to establish an agency. *Zinke v. Estate of Zinke*, 90 Hun, 131, 70 N. Y. St. Repr. 519.

No affirmative judgment on counterclaim.

No affirmative judgment can be rendered in favor of an estate against claimant where a counterclaim is alleged in a trial of a claim by consent. *Matter of Wilmot*, 39 Misc. Rep. 686, 80 N. Y. Supp. 651.

¶ 430 Application of Statute of Limitations.

It is the duty of the executor to raise the defense of the statute. *Butler v. Johnson*, 111 N. Y. 204; *Matter of Goss*, 98 App. Div. 489; *Burnett v. Noble*, 5 Redf. 69.

Where a contract for board and care is made by the week, the claim accrues from week to week and the statute applies accordingly. *Matter of Gardner*, 103 N. Y. 533; *Matter of Goss*, 98 App. Div. 489.

Where services are rendered on an open account with agreement expressed or implied to pay therefor the recovery can be for only six years previous to the death of the debtor. *Leahy v. Campbell*, 70 App. Div. 127, 75 N. Y. Supp. 72.

A partial payment by the representative upon a claim already barred will not revive the claim. *Burnett v. Noble*, 5 Redf. 69.

When statute of limitations begins to run under general hiring.

Where services are rendered under a general retainer year after year without any express agreement as to the time or measure of compensation or the term of employment — no payments being made — the law for the purpose of determining when the Statute of Limitations begins to run will not imply an agreement that the payment of compensation shall be postponed until the termination of the employment, but will regard the hiring as from year to year and the wages as payable at the same time. *Davis v. Gorton*, 16 N. Y. 255; *In re Gardner*, 103 N. Y. 533. The Statute of Limitations is a bar to a claim for more than six years of services in such employment immediately preceding the death of the decedent, unless it appears that payments have been made to apply thereon within six years, in which case a recovery is proper for a period beginning six years prior to the first of said payments. *In re Stewart's Estate*, 21 Misc. Rep. 412, 47 N. Y. Supp. 1065.

In case of a general hiring with no wages stated or time of payment or of service agreed upon, recovery can be had for six years only. *Matter of Gardner*, 103 N. Y. 533; *Shafer v. Pratt*, 79 App. Div. 447, 80 N. Y. Supp. 109.

Statute of limitations where debts are charged on real estate and can be paid only after sale thereof.

In a case where there is no personal estate, and a power to sell real estate to pay debts is given, the Statute of Limitations will not begin to run against such debts as are duly filed with the executors and not rejected, until the sale of the real estate takes place. *Matter of Prince*, 56 Misc. Rep. 222.

¶ 431 Testimony from Claimant of Facts Which Are Claimed Not to Constitute a Personal Transaction.

Rendering services.

“Where an infant sues for services rendered to a person, deceased at the time of the trial, and an important issue in the action is whether the services were to be paid for or were gratuitous, the plaintiff cannot testify that she attended the deceased in her lifetime, stayed with her at night, did errands for her, and rendered many other menial services; such testimony is inadmissible under section 829 of the Code of Civil Procedure. Such evidence cannot be regarded as harmless because merely cumulative, as the fact that services of such a character were rendered is a circumstance worthy of consideration upon the question whether a promise was made to pay therefor.” *Taylor v. Welsh, Exr.*, 92 Hun, 272; *Hartig v. Hartig*, 147 App. Div. 6.

In seeking to recover for nursing A. claimant was allowed to testify to his presence at the house of A. for many consecutive days — held error. *Heyne v. Doerfler*, 124 N. Y. 505.

In seeking to recover for value of services of a team in conveying deceased, claimant was held to be incompetent to testify to going to the home of the deceased and then driving to another place and back again. *Mitchell v. Hollands*, 72 App. Div. 224.

Plaintiff alleged an agreement with her husband that he should pay \$300 a year and that she should provide for the household expenses. Having given proof of such agreement she was allowed to swear that he got some things for the house and she got the rest. *Denise v. Denise*, 110 N. Y. 562–567.

The section does not prevent the witness giving evidence of other facts not dependent upon the evidence of the deceased party, but still having a tendency to establish the right to maintain the defense of the party from whom the evidence is proposed to be derived. *Guibert v. Saunders*, 10 N. Y. St. Repr. 43.

Delivery of note or other paper.

Where the inference to be drawn from the possession of an instrument is depended upon for proof of delivery, then testimony of possession necessarily involves proof of a personal transaction with the deceased and therefore comes within the inhibition of the statute. *Wilber v. Gillespie*, 127 App. Div. 604.

Testimony as to placing a deed in his father's box, where such evidence would tend to prove that the deed had once been delivered to the claimant by the deceased — *held* incompetent. *Parker v. Parsons*, 79 App. Div. 310.

Dentist allowed to testify to working on plates for patient in absence of patient. *Howe v. Regensburg*, 75 Misc. Rep. 132.

Evidence of contract.

Where the only proof of a contract is from claimant's husband there ought to be some corroboration or his evidence should be clear, certain and free from suspicion. *Scheu v. Blum*, 119 App. Div. 825.

Testimony emanating from the claimant directly establishing the character and general nature of important services rendered by him to the deceased upon which rests the inference that a contract was made is incompetent. *Moses v. Hatch*, 38 App. Div. 140, 56 N. Y. Supp. 561.

Handwriting of signature.

The claimant cannot give testimony that the signature is genuine as such evidence is based upon personal transactions with the deceased, even though disconnected with the transactions in question. *Wilber v. Gillespie*, 127 App. Div. 604.

Books kept by claimant.

Account books in the handwriting of the claimant when duly proved by others, are not incompetent under § 829. *Matter of Runions*, 71 Misc. Rep. 641.

Incompetency of witnesses, section 829; in cases involving agency.

Transactions with a deceased agent of a deceased person are competent on trial of a claim against such deceased person. *Warth v. Kastriner*, 114 App. Div. 766.

The claimant alleged that he was the agent of his wife in managing her real estate, and was allowed to testify to paying certain bills contracted for the benefit of the property. *Zinke v. Estate of Zinke*, 90 Hun, 131, 70 N. Y. St. Repr. 509, 35 N. Y. Supp. 645.

The executor or administrator may testify although interested as legatee.

This section prohibits parties from giving testimony in their own behalf or interest against the personal representatives of a deceased person, concerning a personal transaction or communication with the deceased, but it does not prohibit an executor or administrator, who is a party to the suit, from being examined in favor of the estate touching such a transaction, when the adverse party was present participating and when it is otherwise competent. It opens the door for the admission of testimony from adverse parties that would otherwise be excluded, but if the personal representatives of the deceased elect to take such risk they have the right to do so. *McLaughlin v. Webster*, 141 N. Y. 76.

Section 829, Code Civ. Pro., recognizes the right of a party, suing as executor or administrator, to testify in his own behalf to a personal transaction or communication between the witness and the deceased, if it is otherwise competent. In that case the adverse party may also testify against the executor or administrator, but the testimony, if it involves a personal transaction or communication with the deceased, must be confined strictly to the same transaction or communication to which the executor or administrator has already testified in his own behalf. It was competent for the defendant, if he could, to testify in regard to the same transaction referred to by the plaintiff in her testimony. *Mc-*

Laughlin v. Webster, 141 N. Y. 76. Confining himself to that transaction he could testify to any fact or circumstance that was a part of or involved in it that tended to contradict or weaken the plaintiff's version of it. But he could not explain, impair, or contradict the plaintiff's version by means of another and independent personal transaction or communication between himself and the deceased. *Martin v. Hillen*, 142 N. Y. 140; aff'g, 50 N. Y. St. Repr. 505, 21 N. Y. Supp. 309.

Competency of witness whose claim has been paid when called by representative. See ¶ 386.

Where an account is sought to be surcharged, the representative himself may testify to personal transactions between the deceased and a donee, and he may call the donee to testify to such transactions. If the representative investigates and acts, whether in paying a claim, or in collecting a debt, or refusing to collect or recover an apparent asset, he may have the benefit on his accounting of the evidence upon which he acted; and, if the surrogate finds the evidence sufficient to justify his acts, he will not be surcharged. *Matter of Herrington*, 73 Misc. Rep. 182.

¶ 432 Claims by Near Relatives; Presumption of Gratuitous Services. See ¶ 433.

Where a claim is made by a near relative, living in the family of the deceased, it is incumbent upon the claimant, before he can recover, to overcome, by satisfactory proof, the presumption that such services were rendered gratuitously. The law usually implies a promise to pay upon proof of the rendition of meritorious services, but when such services are rendered by one member of a family for another, evidently prompted by affection, in consequence of reciprocal and mutual obligations, this presumption fails; another takes its place. Then the law presumes that no compensation was intended or expected.

This, however, is not proof but merely a presumption. A presumption is defined by Best as "An inference, affirmative or disaffirmative, of the truth or falsity of any proposition of fact,

drawn by a process of probable reasoning, in the absence of actual certainty of its truth or falsity or until such certainty can be ascertained." 22 Am. & Eng. Encyc. of Law (2d ed.), 1234. If the evidence is of such a character as to overcome the inference that such services were gratuitous, then the claimant is in the same situation as if such services had been rendered to a stranger. This proposition is thoroughly considered in *Davis v. Gallagher* (55 Hun, 593), where Judge Martin says: "We do not think it was necessary to entitle the claimant to recover that he should prove an express and definite contract; but, that, in the absence of such an agreement, it was incumbent upon him to prove such facts and circumstances as would show an understanding or expectation on the part of the decedent to pay, and of the plaintiff to receive, the value of such services and property * * *. The decedent at various times stated that which was to the effect that he was indebted to the plaintiff for his work, and tended to show that it was intended by both parties that he should be paid therefor." See also *Markey v. Brewster*, 10 Hun, 16; aff'd, 70 N. Y. 607; *Robinson v. Raynor*, 28 id. 494; *Marion v. Farnan*, 68 Hun, 383; *Green v. Roberts*, 47 Barb. 521; *Matter of Dailey*, 43 Misc. Rep. 554, 89 N. Y. Supp. 538.

The presumption is strengthened if the claimant and decedent were members of the same family, enjoying the same home comforts and conveniences and sharing with others the burdens involved in maintaining a common home. *Matter of Schmidt*, 68 Misc. Rep. 13.

The presumption is largely based upon the family relation of the parties and not upon family kinship. Where sisters lived apart, and were only brought together by the illness of one, the rule of gratuitous service was not applied. *Matter of Lannon*, 75 Misc. Rep. 66.

Burden of proof.

The presumption of gratuitous services is not based so much upon the mere incident of kinship as upon the fact of reciprocal benefits and advantages springing from the actual and practical

relation between the parties. Proof of family relationship does not of itself constitute a complete defense, and the burden is upon the contestant to show facts sufficient to overcome the presumption of an implied contract. *Matter of Parker*, 69 Misc. Rep. 136; *Moore v. Moore*, 3 Abb. Ct. App. Dec. 303.

Sufficiency of proof.

There should be evidence showing that services were accepted by deceased with intent to pay therefor. Claim by daughter-in-law against mother-in-law, living separately in same house — not allowed. *Rock v. Rock*, 105 App. Div. 157.

Claims withheld during the lifetime of an alleged debtor and sought to be enforced after his death are always to be carefully scrutinized and only admitted upon satisfactory proof. *Kearney v. McKeon*, 85 N. Y. 136.

The presumption of gratuitous services, when the relationship of the parties raises that presumption, must be rebutted by a preponderance of evidence that is convincing and satisfactory. *Platt v. Hollands*, 85 App. Div. 231, 83 N. Y. Supp. 556.

The legal presumption of an obligation to pay is very weak where the services rendered are of such a character that, from the relations existing between the parties, they evidently were prompted by motives of affection. If the circumstances are such as to lead to the conclusion that the services were rendered gratuitously, the law will not imply an obligation to pay. *Matter of Stewart*, 21 Misc. Rep. 412, 47 N. Y. Supp. 1065.

There is no presumption of law against a contract for support between mother and son. *Ulrich v. Ulrich*, 136 N. Y. 120; rev'g, 42 N. Y. St. Repr. 216, 17 N. Y. Supp. 721.

Fictitious character of several claims presented and the exaggeration of services rendered pervading the whole testimony require disallowance of such claims. *Hughes v. Davenport*, 1 App. Div. 182, 72 N. Y. St. Repr. 523, 37 N. Y. Supp. 243.

Claim for paying taxes and for boarding the testatrix, and proof of a cause of action — held, that there was an implied promise to

pay. *Matter of Stringer*, 39 N. Y. St. Repr. 900. See also *Matter of Lang*, 144 N. Y. 275; rev'g, 67 Hun, 107, 22 N. Y. Supp. 44.

Executor paid the claim of the daughter for care of her mother — on accounting under objection to such payment — *held*, that there was no presumption of law against an alleged agreement to pay for such services. *Matter of Stevenson*, 86 Hun, 325, 67 N. Y. St. Repr. 207, 33 N. Y. Supp. 493.

As between father and daughter living in the same family we should not conclude that such a direct contract existed, except upon clear and convincing proof. *Matter of Hart v. Tuite*, 75 App. Div. 323, 324; *Robinson v. Carpenter*, 77 id. 520; *Matter of Van Slooten v. Wheeler*, 140 N. Y. 624; rev'g, 76 Hun, 55.

A person standing in relation of a child to testator, though not legally adopted, will be considered a near relative in considering a claim for services. *Matter of Dailey*, 43 Misc. Rep. 552, 89 N. Y. Supp. 538; *Davis v. Gallagher*, 55 Hun, 593, 39 N. Y. St. Repr. 882; rev'd, on question of evidence, 124 N. Y. 487.

Declarations of deceased.

It is always unsatisfactory to uphold a liability against an estate upon proof of declarations alone. The courts have had occasion heretofore, and with good reason, to criticise evidence of this character. *Law v. Merrills*, 6 Wend. 268; *Matter of Schmidt*, 68 Misc. Rep. 13.

It is a primary rule of evidence that proof of oral admissions of a party is considered the weakest kind of evidence and always to be accepted with scrutiny and caution. 1 Greenl. Ev., ¶¶ 200, 201; *Stephens v. Vroman*, 18 Barb. 250; *Mich. Carb. Works v. Schad*, 38 Hun, 71.

A remark of deceased that she would now be able to pay her sister for all she had done for her if not before she died, then afterward, does not establish a contract or rebut the presumption of gratuitous services. *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530.

Declarations in absence of claimant that "she ought to be paid," etc., are not sufficient evidence of promise. *Matter of Dusenberry*, 10 Misc. Rep. 633, 66 N. Y. St. Repr. 217, 32 N. Y. Supp. 820.

Disallowed.

Brother against brother. *Bowen v. Bowen*, 2 Bradf. 336.

Sister-in-law against sister-in-law. *Van Kuren v. Saxton*, 3 Hun, 547.

Brother-in-law against brother-in-law. *Meehan v. Heffernan*, 73 App. Div. 615.

Daughter against father. *Hallock v. Teller*, 2 Dem. 206; *Conway v. Cooney*, 111 App. Div. 864.

Where a daughter after arriving at twenty-one years of age continues a member of her father's family, renders services, and receives support, she cannot recover for such services without an express promise to pay. *Green v. Roberts*, 47 Barb. 521; *Merchant v. Merchant*, 25 N. Y. St. Repr. 269, 6 N. Y. Supp. 875.

Claim of nephew against uncle not allowed on testimony of son of claimant and other evidence. *Matter of Jones*, 28 Misc. Rep. 338, 59 N. Y. Supp. 893.

Allowed.

Nephew against aunt. *Fleer v. Finkin*, 39 N. Y. St. Repr. 902, 15 N. Y. Supp. 514.

Sister-in-law against sister-in-law. *Darde v. Conklin*, 73 App. Div. 590.

Daughter against father. *Matter of Ryder*, 38 N. Y. St. Repr. 29.

Niece against aunt. *Matter of Galway*, 19 Misc. Rep. 92, 43 N. Y. Supp. 970.

A daughter, married, and having a home of her own, was requested by the father to care for him in his illness, and was allowed to recover. *Matter of Strickland*, 10 Misc. Rep. 486, 65 N. Y. St. Repr. 250.

A sister nursed her brother through an illness and he gave her an envelope indorsed to the effect that it should not be opened

during his life but returned upon demand. The envelope contained a note for \$10,000 — *held*, a good note against the maker's estate. *Worth v. Case*, 42 N. Y. 362.

Stepchildren.

A person is not bound to maintain his stepson, nor is he entitled to claim the services of such son. But if he does maintain him and stands *in loco parentis* to him, the stepson cannot maintain an action for services without an express promise. *Williams v. Hutchinson*, 5 Barb. 122; *Sharpe v. Cropsey*, 11 Barb. 224; *Otis v. Hall*, 117 N. Y. 131; *Matter of Teyn*, 2 Redf. 306.

¶ 433 Weight of Evidence of Husband, Wife, or Near Relative Discussed. See ¶¶ 425, 432.

While the evidence to establish contracts, gifts *inter vivos* or *causa mortis*, sought to be enforced after death, is always closely scrutinized by the courts, and clear, convincing, and satisfactory proof of the facts is required, gifts may be upheld upon the unsupported evidence of a wife, husband, or other relative of a party; the fact that the witness by whom it is sought to establish the gift may be said to be interested in the result should not preclude a finding that the gift had been established by the testimony of such a witness. "If the question as to the gift was being tried before a jury, the mere fact that the witness proving the gift was the wife of the donee would not permit the court to take the question from the jury; and if the jury under proper instructions believed the wife, and there was nothing which made it manifest that the story of the wife was incredible, the verdict could not be disturbed." *Farian v. Wiegel*, 76 Hun, 467. In *Bouton v. Welch* (170 N. Y. 554), the report of the referee established the gift of a mortgage to the wife upon the unsupported testimony of the husband to an oral agreement; having been affirmed, the Court of Appeals, in adjudging that the husband was a competent witness, held that the affirmance of the Appellate Division (59 App. Div. 288) was conclusive if no legal error was committed in the reception or exclusion of evi-

dence. In *Westerlo v. DeWitt* (36 N. Y. 340), the delivery of a certificate of deposit, without indorsement, by a decedent in her last illness, accompanied by words evincing an intention to make a gift, was found by a referee to have been intended as a gift, upon the solitary testimony of the donee herself (35 Barb. 215).

In the case to which we are referred, where the evidence has been held insufficient to establish the alleged contract, or gift, upon the uncorroborated testimony of the wife, husband, or relative, there were circumstances of suspicion, or the character of the witness was such as to shake the confidence of the court in passing upon the facts of the case. *Farian v. Wiegel*, 76 Hun, 462; *Matter of Manhardt*, 17 App. Div. 1; *Rosseau v. Rouss*, 180 N. Y. 116. In the *Farian* case the donee claimed the entire estate of the donor to the exclusion of his next of kin; all the testimony tending to support the gift was given by the donee's wife. The entire estate consisted of money deposited in six savings banks. There were, as stated in the opinion, circumstances of great probative force, which rendered the testimony of the wife improbable. In the *Manhardt* case the donee did not assert his claim until six months after the death of the donor, and after he had been required by the Surrogate's Court to surrender the securities claimed as a gift, and in the meantime had made admissions inconsistent with his claim, and had exhibited the bond and mortgage in question as a part of the donor's estate. In the *Rosseau* case a promise of the decedent to settle \$100,000 upon his illegitimate child was supported only by the testimony of the mother. *Andrews v. Nichols*, 116 App. Div. 649.

¶ 434 Proof of Notes and Checks as a Debt.

Delivery.

By section 35 of the Negotiable Instruments Law it is provided: "Where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

Ordinarily the possession and production of a note will raise a presumption of delivery. *Cowee v. Cornell*, 75 N. Y. 96; *Carnwright v. Gray*, 127 id. 92; aff'g, 57 Hun, 518, 33 N. Y. St. Repr. 98, 11 N. Y. Supp. 278.

When proof of the possession of a promissory note and of the genuineness of the signature thereto are exclusively relied upon to establish delivery, the presumption is that the evidence as to possession involves a personal transaction. *Richardson v. Emmett*, 170 N. Y. 412, 417; *Clift v. Moses*, 112 id. 426. When, however, delivery is proved by independent testimony, showing delivery to a third person for the interested witness when he was not present, proof of possession does not imply a personal transaction. *Hoag v. Wright*, 174 N. Y. 36; rev'g, 69 App. Div. 318, 74 N. Y. Supp. 1069.

A note delivered to a sister in a sealed envelope, with instructions not to open until the maker's death, is completely delivered. *Worth v. Case*, 42 N. Y. 362.

Proof of indorsement as evidence of payment on note.

Where the only evidence of payment on a note consists in the indorsement, that indorsement should be in the handwriting of the maker or have been made in his presence. *Matter of Salisbury*, 41 Misc. Rep. 274, 84 N. Y. Supp. 215.

Payable at or after death.

A note payable at death or at a specified time after death may be valid. *Carnwright v. Gray*, 127 N. Y. 92.

Payable on demand; statute of limitations.

Where a note is payable on demand the Statute of Limitations begins to run immediately. *Smith v. Ijams*, 70 Hun, 160; aff'd, 141 N. Y. 552; *Church v. Stevens*, 56 Misc. Rep. 572.

Proof of check as a debt.

Where the debt is based upon a check as evidence of the loan, it is not sufficient to show that deceased was not indebted for one

thing and another, as the presumption is that a check pays a debt. *Kilmer v. Quackenbush*, 125 App. Div. 352.

Stubs of checks cannot be received in evidence as showing a course of business in lending money in an attempt to prove that a check created a debt. *Leask v. Hoagland*, 205 N. Y. 171; rev'g, 144 App. Div. 138.

¶ 435 Proof of Consideration.

Section 50 of the Negotiable Instruments Law is as follows:

Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

In seeking to establish a note as a valid obligation against the estate of the decedent, the claimant assumes the burden of showing, by a fair and reasonable preponderance of evidence, that the same was executed and delivered for a legal consideration; and such duty remains with the claimant during the entire trial. This burden is met, in the first instance, by presentation and proof of the execution of the note. Proof of the note *prima facie* establishes the claimant's cause of action and the executor, thereupon, becomes bound to controvert it by evidence; but "When such evidence is given, and the case upon the whole evidence, that for and against the facts asserted by the plaintiff, is submitted to the court or jury, then the question of burden of proof as to any fact, in its proper sense, arises, and rests upon the party upon whom it was at the outset, * * * and is not shifted by the course of the trial, that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence." *Farmers' Loan & Trust Co. v. Siefke*, 144 N. Y. 359.

The general principle seems to be that, if the claimant is not content to rest his case upon the presumption, but gives affirmative proof to establish the consideration, no other consideration than that to which the evidence is directed will be assumed or presumed. *Matter of Pinkerton*, 49 Misc. Rep. 367.

Holder need not prove consideration.

A note need not express a consideration and none need be proved by the plaintiff to entitle him to recover. *Carnwright v. Gray*, 127 N. Y. 92.

Where it does not appear on the face of the instrument that there is no consideration or that there is an invalid consideration, the legal presumption of a consideration obtains and a *prima facie* case is made. *Hickok v. Bunting*, 92 App. Div. 167; former app., 67 id. 560; aff'd, 182 N. Y. 530.

Where a note imports a consideration on its face, the burden is upon the defendant to show lack of consideration. *Velie v. Titus*, 60 Hun, 405, 39 N. Y. St. Repr. 897; *Root v. Strang*, 77 Hun, 14, 59 N. Y. St. Repr. 258, 28 N. Y. Supp. 273.

True consideration may be shown.

Notwithstanding a statement in the note as to the consideration, it is open for either party to show the true consideration. *Miller v. McKenzie*, 95 N. Y. 575.

Inadequacy of consideration.

Mere inadequacy in value of the thing bought or paid for is never intended by the legal expression "want or failure of consideration." This only covers either total worthlessness to all parties or subsequent destruction, partial or complete. *Cowee v. Cornell*, 75 N. Y. 91; *Godine v. Kidd*, 64 Hun, 585, 46 N. Y. St. Repr. 813, 19 N. Y. Supp. 335.

Note to son who it was shown had rendered services to his father in many ways. That his family had also rendered such services — *held*, that inadequacy of consideration was not a good defense. *Matter of Flagg*, 27 Misc. Rep. 401, 59 N. Y. Supp. 167.

Intention to make a gift.

A note without consideration payable after death, intended to make a gift after death, is not a valid claim against the estate. *Holmes v. Roper*, 141 N. Y. 64.

Where slight services had been rendered and afterward a will was drawn which provided for the payee named in the note, it was held that there was no consideration for the note. *Matter of Pinkerton*, 49 Misc. Rep. 368.

In regard to a note given by a husband to his wife, the court said that it was the true policy of the law to avoid giving life in equity to that sort of last will. It was the method most open to fraud. *Whitaker v. Whitaker*, 52 N. Y. 368.

Gratuitous services rendered by a daughter to her mother furnishes no consideration for a promissory note proved to have been delivered as a gift. *Strevell v. Jones*, 106 App. Div. 334.

Meritorious consideration.

It seems to be the general doctrine that an executory agreement supported only by a meritorious, as distinguished from a valuable or pecuniary consideration, cannot be enforced in law or in equity. *Wilbur v. Warren*, 104 N. Y. 192; *Twenty-third St. Bap. Church v. Cornell*, 117 id. 601; *Presby. Church v. Cooper*, 112 id. 517.

Love and affection.

Natural love and affection do not constitute a sufficient consideration to support a promissory note. *Hadley v. Reed*, 34 N. Y. St. Repr. 949, 12 N. Y. Supp. 163; *Fink v. Cox*, 18 Johns. 145.

To equalize distribution.

A note given to equalize the distribution of the maker's estate among her children is not founded upon a sufficient consideration. *Hadley v. Reed*, 34 N. Y. St. Repr. 949, 12 N. Y. Supp. 163.

Note given as an acknowledgment of debt.

Claimant, a nephew of deceased, had been helpful to her in collecting a note and had also let his aunt live at his house part of two winters. She mailed him a note for over \$4,000, upon which he was allowed to recover. *Matter of Bradbury*, 105 App. Div. 250.

Note given by a tramp to two young people who befriended him and performed some slight services for him without charge or expectation of pay — *held*, that the note was intended as a payment and not a mere gratuity, and was valid. *Yarwood v. Trust & G. Co.*, 94 App. Div. 47, 87 N. Y. Supp. 947; app. dism., 182 N. Y. 527.

Note recited that it was in consideration of valuable services rendered, and had attached a statement signed by the maker reciting that the note was given as compensation for long and faithful services, etc. — *held*, that the plaintiff could recover. *Root v. Strang*, 77 Hun, 14, 59 N. Y. St. Repr. 258, 28 N. Y. Supp. 273.

Note on demand for \$10,000 in consideration of services rendered to maker delivered to payee in sealed envelope to be opened after his death; proof of valuable services rendered, and of repeated promises to pay therefor made while they were being rendered — *held*, that plaintiff could recover. *Worth v. Case*, 42 N. Y. 362.

Note proved to have been given for board, nursing, and caring for the maker at the house of the payee, and for further similar services to be rendered. All such services were of less value than the note — *held*, that the note was valid. *Miller v. McKenzie*, 95 N. Y. 575.

An uncle agreed to give his nephew \$1,000 by will if he would get up a cane for him — this the nephew did, and the court held the agreement valid. *Bush v. Whitaker*, 45 Misc. Rep. 74.

A roving peddler had been befriended and gave a writing to his benefactor agreeing to pay \$5,000 at his death for such services — *held*, that a man could fix any value he saw fit as compensation for services rendered. *Matter of Todd*, 47 Misc. Rep. 35.

Where a note is made which states expressly that it is for services rendered and shall be in full of all demands for services or otherwise against the maker, a sufficient consideration is made

out. *Velie v. Titus*, 60 Hun, 405, 39 N. Y. St. Repr. 897, 15 N. Y. Supp. 467.

¶ 436 Application of Section 829.

It was held in *Clift v. Moses* (112 N. Y. 435), that section 829 of the Code of Civil Procedure prohibits not only direct testimony of the survivor that a personal transaction took place between him and the deceased and what occurred between the parties, but also every attempt by indirection to prove the same thing.

It was said by Andrews, J., in that case: "The statute cannot be evaded by framing a question which, on its face, relates to an independent fact when it is disclosed by other evidence that the fact had its origin in and directly resulted from a personal transaction." The doctrine of that case was affirmed and applied in the recent case of *Richardson v. Emmett* (170 N. Y. 412). It has also been applied in this Department in the earlier case of *Viall v. Leavens* (39 Hun, 291).

Claimant on a note is not a competent witness to show delivery of the note to him by answering as to where he kept this note and where it was on the day of the maker's death, since those questions involve in an indirect way a personal transaction with deceased. *Matter of Blair*, 99 App. Div. 81; *Wilber v. Gillespie*, 127 App. Div. 604.

Testimony by a son, plaintiff, that he had possession of the notes before his mother's death is incompetent unless it is shown that the notes came to his possession from some other person than his deceased mother. *Hoag v. Wright*, 174 N. Y. 36.

It is not competent to show by claimant that he never received the money on a check made by deceased to him which is offered as a defense to the claim, not that he had never seen the check. *Tillman v. Rayner*, 125 App. Div. 309.

Opinion as to signature.

An interested party may testify to his opinion as to the genuineness of the signature to a note but not to his knowledge that

such signature is genuine by seeing the deceased write it. *Hoag v. Wright*, 174 N. Y. 36.

A son, the claimant, was familiar with his mother's signature; he was asked to examine the notes and state whether or not the signature to each was in his mother's handwriting. An objection was interposed, which sufficiently challenged his competency as a witness, but it was overruled and he answered that he thought the signatures were in his mother's handwriting.

The question called for an opinion, not a personal transaction, and the evidence to qualify the witness to express his opinion was not objected to. We think the ruling is sustained by the authorities. *Wing v. Bliss*, 28 N. Y. St. Repr. 198; aff'd, on opinion below, 138 N. Y. 643; *Simmons v. Havens*, 101 id. 427.

The case of *Boyd v. Boyd* (164 N. Y. 234) is not in conflict with the authorities cited, for the court united only upon the third propositions discussed in the opinion, which involved no question under section 829, Code Civ. Pro.

¶ 437 Subsequent Dealings Between Same Parties.

Where a subsequent dealing existed in which the pretended creditor was to some extent a debtor, and he never once presented his claim in reduction of the debt, the weight of suspicion becomes very great and justifies a demand for distinct and definite proof and the clearest indication of honesty and fairness. *Kearney v. McKeon*, 85 N. Y. 136.

Where the services ended three years before the death of the person for whom they were rendered and no bill had ever been presented, and money transactions were had between a son of claimant and the deceased in which claimant took a part, it was held that the claim was discredited. *Weidman v. Thompson*, 53 App. Div. 24, 65 N. Y. Supp. 481.

In *Matter of Furniss* (86 App. Div. 96), there was a claim made by a brother and his wife. Their son testified that he heard his aunt say upon a certain occasion when she had come

into some money that now she would be able to repay his father and mother for all that they had done for her, "if not before she died, why, afterward." It was held that this declaration failed to establish either a prior agreement upon her part to pay for such service or any legal obligation to pay for the same in the future. In *Rock v. Rock* (105 App. Div. 157), weight was given to the fact that during the lifetime of the deceased money transactions were had between the parties, without mention of the alleged indebtedness.

The fact that there had been subsequent dealings between the parties in which money was paid without mention of the alleged prior indebtedness may be considered upon the question of sufficiency of satisfactory proof. *Rowland v. Howard*, 75 Hun, 4, 56 N. Y. St. Repr. 722, 26 N. Y. Supp. 1020; *Porter v. Rhoades*, 48 App. Div. 635, 63 N. Y. Supp. 112.

Application of revised law to proceedings for accounting and judicial settlement.

Where a petition which institutes a proceeding is filed before September 1, 1914, that proceeding must be conducted and concluded under the former law. Where a new proceeding is instituted, although the appointment of the representative, guardian or trustee was made prior to September 1, 1914, that proceeding will be conducted and determined under the revised law, unless any rights had accrued under the prior law, as will be adversely affected by the application of the new law. See § 2771 (¶¶ 368, 476).

CHAPTER LVI.

Final Judicial Settlement, continued; Decree of Judicial Settlement; What it Should Contain; Antenuptial Agreements; Rights of After-Born Children; Advancements.

- ¶ 438. Jurisdiction to settle account.
- ¶ 439. § 2742. Decree should recite jurisdictional facts.
- ¶ 440. § 2735. Decree should direct distribution.
- ¶ 441. Decree may set off exempt property.
- ¶ 442. Determine validity of assignments.
- ¶ 443. Charging legacy on real estate.
- ¶ 444. Distribution of real property converted.
- ¶ 445. Construction of antenuptial agreements.
- ¶ 446. § 26 (D. E.). Decree should protect rights of after-born child.
- ¶ 447. § 27 (D. E.). Decree should protect estate in case of devise or bequest to witness to will.
- ¶ 448. § 2738. Decree should adjust advancements.

¶ 438 Decree of Judicial Settlement.

The account of the representative having been examined, contested, and settled, the amount of the estate which remains for distribution becomes fixed and the summary of such account as allowed and adjusted is embodied in the decree of judicial settlement. But there remain other questions to be determined before the decree shall be finally settled upon and filed.

The rights of the various interested parties to share in the surplus must also be determined, and it is the office of the decree not only to settle the account but to direct a proper distribution of the sum remaining on hand.

In cases of intestacy distribution must be made to the next of kin according to their rights. In cases of testacy distribution must be made among the legatees in accordance with their respective rights.

To determine these questions proof may be taken to show who

are the persons entitled to the surplus and the amount of their respective shares.

In every case the surrogate has full and complete jurisdiction to determine every question which must be decided to enable him to make a proper decree of distribution.

"Ready to be distributed."

"The estate is 'ready to be distributed' when its resources have been gathered and marshaled, so that their extent and nature are known, and its expenses and obligations have been ascertained. The expression 'ready to be distributed' cannot mean that a direction for the final disposition of the estate can only be made when it has been wholly reduced to money. If that were the interpretation, the distribution would be made to await the sale of the last insignificant item of property. Where there still remains property which has not been turned into cash, a complete decree may be made, in which the property may be taken at an estimate of its present value, however nominal or tentative; and, upon a change of circumstances, further direction may be made upon the foot of the decree, while, in the meantime, the enforcement of the decree may be the subject of regulation and restraint." *Matter of Snedeker*, 61 Misc. Rep. 216.

General Jurisdiction to Settle an Account.

"Upon the final accounting the surrogate has jurisdiction and must inquire into the allegation of payments made by the legal representative of the estate. *Matter of Underhill*, 117 N. Y. 471. The surrogate determines the validity of the payments made by the executor and after such determination the amount of the estate for the purpose of distribution is also determined, that amount of course enhanced by disallowing any payments alleged to have been made on account of the estate where the same may have been an overpayment and when the distributee is a party to the accounting. The surrogate has jurisdiction to determine the amount of payments which the administrator shall

have credit for, because upon the determination of that fact depends the question of the amount of assets with which the administrator is to be charged for the purpose of decreeing distribution of the decedent's estate. The power to decide those facts as to payment springs from the power of the surrogate over the accounts of the administrator and his power to allow the legal and disallow the illegal payments which the administrator may have made and which he claims in his account. Having this power, it may well be that all the facts which are material in the course of the investigation which the surrogate may properly make should be before him.

“ Though a judicial officer with limited and prescribed powers, the surrogate in a proceeding before him having for its object the settlement of an executor's account and to obtain a decree directing the distribution of the funds in his hands, and with all parties in interest present, may construe the provisions of a will whenever such a determination is necessary in order to make a decree of distribution. Code Civ. Pro., § 2510; *Matter of Verplanck*, 91 N. Y. 439. Such a jurisdiction is one which is incidental to the office of the surrogate and which places clearly the authority conferred upon him by statute, and if the surrogate is thus entitled to construe the provisions of a will in order to determine the distributive shares and interests, he also should be entitled to hear the testimony of the administrator in this proceeding as to payments claimed to have been made by him in the process of the administration of the estate in his hands.

“ This is an application for the final judicial settlement of the accounts of the administrator and it would seem from the opinion of the court in *Riggs v. Cragg* (89 N. Y. 479), that the Surrogate's Court can exercise the powers prescribed by statute and such incidental powers as are requisite to the exercising of the powers expressly given, and that having all parties in interest before him upon this accounting the surrogate is entitled to settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share, to whom the same shall be payable, and the sums to be paid to each person interested.

“As to whether the given transaction is to be considered as a payment is a question which is for the determination of the surrogate and as it may or may not be determined in the administrator’s favor the administrator may present his evidence and be heard before the court.” *Matter of Robinson*, 42 Misc. Rep. 169, 85 N. Y. Supp. 1087.

The father signed a note with his son and afterward took up the note, having it in his possession at the time of his death,—*held*, that the amount due should be offset against the distributive share of the son. *Eltinge v. Hull*, 2 Dem. 562.

¶ 439 Decree of Judicial Settlement Should Recite Jurisdictional Facts, and Contain Summary of Account.

Decree of judicial settlement should recite the service of citation upon all parties.

Jurisdiction of all parties cited may have been properly obtained by service upon them, but in the course of time such proof may be lost or inadvertently misplaced in the records of the surrogate’s office and thereby an opening be left to raise a question as to the conclusiveness of the decree upon all parties interested. By section 2513 of the Code of Civil Procedure (¶ 26) it is provided that the fact that the parties were duly cited is presumptively proved by a recital of that fact in the decree.

It is, therefore, an important measure of precaution against the loss or misplacing of such proof that the decree should contain such a recital.

Decree on judicial settlement should recite jurisdictional facts.

The decree on judicial settlement should contain a complete, but concise, statement of all the proceedings had and taken before the surrogate and the result thereof.

It should recite the filing of account and vouchers, the issuing of a citation, or the filing of due waivers of citation.

It should give the names of all the persons over whom juris-

diction was acquired and state which of them appeared in person and by attorney.

It should give the names of all infants and incompetent parties and should recite the due appointment of a special guardian for such persons and his appearance for them.

It should state whether or not an order assessing the transfer tax had been made and the result thereof, the payment of such tax, and the filing of the proper voucher.

Decree on judicial settlement should show an abstract of the account, and a summary statement thereof.

Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled; or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree.

From § 2742, Code Civ. Pro.

Parties may agree upon facts and amounts which differ from those contained in the account, and a decree based upon such agreement will not be void. *Matter of Mount*, 27 Misc. Rep. 411, 59 N. Y. Supp. 176.

Errors of substance in accounts upon which a decree of judicial settlement is based can only be corrected on appeal. *Matter of Mount*, 27 Misc. Rep. 411, 59 N. Y. Supp. 176.

The decree on judicial settlement should state the amount of the inventory or of the money and property which came to the hands of the representative, and all increase thereon and the total of such property and increase.

It should show the total amount allowed in the account for loss and depreciation and for expenses, debts, and legacies (in case of testacy) which have been paid and allowed.

It should also show the amount of commissions to which the representative is entitled.

It should also contain the amount allowed by the surrogate for the expenses of the judicial settlement, which allowance includes reimbursement to the representative for expenses of the settlement paid by him since the filing of the account and the

allowance to him for the services of his attorney upon the settlement.

Where there has been a contest and any party is entitled to costs, the decree should determine who should receive the same and fix the amount thereof (§ 2746, ¶ 153) and specify by what parties or from what funds the same shall be paid (§ 2744, ¶ 152).

All allowances and costs should be made to the party, and not to the attorney.

It should also contain a statement of the amount of the surplus to be distributed by the decree.

¶ 440 Decree on Judicial Settlement Should Direct Distribution.

One of the objects of an accounting in Surrogate's Court by a trustee is manifestly that the property involved in the trust, for which the trustee is accounting, may be in that proceeding divided among and distributed to those who are entitled to receive it. The statute confers on that court ample power to accomplish this result. This purpose is not accomplished by directing transfer of the property in bulk to the parties entitled thereto, and simply designating their fractional shares therein. If this practice were to obtain, instead of a division of the property in that court, resort to a subsequent action in order to obtain such partition and division would in many cases be necessary. *Matter of Hunt*, 121 App. Div. 96, 105 N. Y. Supp. 696.

Decree for payment and distribution.

Where an account is judicially settled, as prescribed in this article, and any part of the estate or fund remains and is ready to be distributed, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. * * *

From § 2735, Code Civ. Pro.

The amount of the surplus having been fixed, the decree should direct its distribution to the proper persons, naming them, and the share and the amount payable to each.

Where a trust is created it should direct payment of the amount of the trust fund to the trustee to be held and applied by him in accordance with the terms of the trust.

Where any legacy above the sum of \$50 or any distributive share above \$150 is payable to an infant, the decree should direct payment to the general guardian, if one has been appointed and has given sufficient security; if none has been appointed it must direct payment to guardian if appointed within a reasonable time fixed, or, if none is appointed and the party entitled is still an infant, it must direct payment of the same into court. If the amount is less than above stated, it may be paid to the father of the infant or to the mother of the infant. See ¶ 472.

Where the party entitled is an incompetent person, payment must be made to his committee or deposited in court in the same manner as in case of an infant.

The direction to distribute to the persons entitled does not apply to the accounting of a temporary administrator, as he must pay over to a successor. *Matter of Philp*, 29 Misc. Rep. 263, 61 N. Y. Supp. 241.

The direction for distribution is mandatory when all questions of rights and liens have been settled. *Matter of Horn*, 7 App. Div. 89, 39 N. Y. Supp. 954.

The decree upon an accounting of an executor or administrator which distributes the estate of a decedent should adjudge that the payment of the amounts to be distributed be made by the individual and not by him as executor or administrator. *Matter of Monell*, 28 Misc. Rep. 308, 59 N. Y. Supp. 981.

Payment to attorney in fact.

Payment may be authorized to an attorney in fact who files a proper power of attorney.

Payment by an administrator to himself as the attorney in fact for one of the next of kin should not be directed. *Lahn v. Sullivan*, 116 App. Div. 669, 41 id. 623; aff'd, 166 N. Y. 595.

The appointment of some person other than the representative

as an attorney in fact will be recognized. *Anderson v. Fry*, 116 App. Div. 740.

But payment to the attorney for one of the parties should not be directed by the decree.

¶ 441 Decree on Judicial Settlement May Provide That Exempt Property May be Set Apart or Paid for.

The decree made on judicial settlement may award to a surviving husband, wife, or child the same relief as to set-off of property which may be awarded in his or her favor on a petition presented as prescribed in section 2671.

From § 2735, Code Civ. Pro.

See §§ 2670, 2671, ¶¶ 192, 193.

Where the death occurred before September 1, 1914, the property rights under former section 2713 Code Civ. Pro. attached, and set-off should be made after that date in accordance with that section as to the amount and extent of the property to be so set off. The amendment taking effect on September 1, 1914, can not affect rights of persons to property where the death occurred before that date, but affects only the procedure in obtaining such set-off. See § 2670, ¶ 192.

Where a husband dies without having received his set-off, his estate cannot enforce the right on judicial settlement after six years and eighteen months from the issue of letters on the estate of the wife. *Matter of Campbell*, 96 App. Div. 561, 89 N. Y. Supp. 569.

A widow having died before final accounting and not having been set off the exempt articles, her representative may claim them upon such accounting. *Matter of Hulse*, 41 Misc. Rep. 307, 84 N. Y. Supp. 220; *Matter of Warner*, 53 App. Div. 565, 65 N. Y. Supp. 1022.

May be paid in money on judicial settlement.

Where the appraisers do not set off to the widow the exempt property, and the executor or administrator sells the same, payment to her of the value thereof may be decreed on final settlement. § 2671, Code Civ. Pro.; *Sheldon v. Bliss*, 8 N. Y. 31.

Set-off may be made to the widow on judicial settlement. *Matter of Maack*, 13 Misc. Rep. 368, 69 N. Y. St. Repr. 483, 35 N. Y. Supp. 109.

On judicial settlement if the property which might have been set off to the widow under subdivision 5, section 2713 (now § 2670), Code Civ. Pro., no longer exists, the widow may have \$150 in cash. *Matter of Bidgood*, 36 Misc. Rep. 516, 73 N. Y. Supp. 1061.

Decree may determine rights to legacies and distributive shares.

Since the enactment of § 2510 (¶ 14) the Surrogate's Court has ample authority to determine all questions as to rights of persons to legacies or distributive shares.

Decisions under former practice.

The jurisdiction of the surrogate to determine questions affecting the right to a distributive share of the estate has been uniformly upheld. *Foster v. Hawley*, 8 Hun, 68; *Adee v. Campbell*, 14 id. 551, and also in 79 N. Y. 52; *Hurtin v. Proal*, 3 Bradf. 414; *Ferrie v. Public Adm.*, id. 151-249 and 4 Bradf. 28; aff'd, 23 N. Y. 90.

It is well settled that a surrogate has power, for the purpose of distributing the estate to the persons entitled as legatees, next of kin, husband, or wife, according to their respective rights, to ascertain who are the persons interested, and what is the amount to which each is entitled. *Fowler v. Lockwood*, 3 Redf. 465; *Du Bois v. Brown*, 1 Dem. 317; *Gibbons v. Shepard*, 2 id. 247; *Matter of Collyer*, 4 id. 24; *Matter of Thompson*, 5 id. 117-124; *Matter of Gilligan*, 3 N. Y. Supp. 17; *Matter of George*, id. 426; *Riggs v. Cragg*, 89 N. Y. 479.

To accomplish that end he has jurisdiction to construe a will to determine to whom legacies shall be paid. *Matter of Verplanck*, 91 N. Y. 439; *Purdy v. Hayt*, 92 id. 446.

The surrogate may determine how much has been paid by the representative to a next of kin or legatee to apply on his share although such person denies the payment. *Matter of Robinson*, 42 Misc. Rep. 169, 85 N. Y. Supp. 1087.

As incidental to the power to settle the account the surrogate has jurisdiction to determine whether the principal of the fund has been properly disposed of. *Matter of Wilkin*, 90 App. Div. 324, 86 N. Y. Supp. 360; later appeal, 100 App. Div. 509.

¶ 442 Where a Claim, Legacy, or Distributive Share Has Been Assigned. See ¶ 33.

While there is jurisdiction to settle the accounts of executors and administrators, enforce distribution, and direct payment to the persons entitled as creditors, legatees, next of kin, husband, or wife of the deceased or their assigns, the statute impliedly limits the power to direct payment to those cases "where the validity of a debt, claim, or distributive share is not disputed or has been established."

Since the enactment of § 2472a, Code Civ. Pro., the surrogate has had express jurisdiction "to ascertain the title to any legacy or distributive share" upon an accounting. Where such legacy or share has been assigned and is claimed by two parties, the validity of such assignment may be determined, and a jury trial of the question ordered if necessary.

In examining questions relating to assignments of legacies and shares care must be taken not to confuse cases decided before and after such amendment took effect in 1910.

Construction of a trust.

This section does not permit the construction of a trust which is due to one legally a stranger to the accounting. *Matter of Mueller*, 47 N. Y. Law J., 1673.

But otherwise where the agreement was with the deceased and the executor. *Matter of Delgado*, 79 Misc. Rep. 590.

Usurious assignment.

Where an objection is made that an assignment of a legacy was usurious the question was tried and the assignment forfeited. *Matter of Baker*, 77 Misc. Rep. 90.

¶ 443 Decree Should not Declare a Legacy a Charge Upon Real Estate.

The surrogate upon judicial settlement has no jurisdiction to make a decree adjudging that a legacy is chargeable upon real estate and directing the devisee of any real estate to pay the amount of the legacy. Aside from his lack of jurisdiction, there is no provision of law by which such a decree could be enforced. *Matter of Day*, 75 Misc. Rep. 597; *Matter of Taber*, 132 App. Div. 495; *Bevan v. Cooper*, 72 N. Y. 317; *Riggs v. Cragg*, 89 N. Y. 479.

The reason for not making such a decree is not that the surrogate has no authority, in a proper case to decide that question. but that the judicial settlement proceeding does not raise that issue and therefore a decision is not necessary to a decree.

If however, under the present practice, the question should arise whether the personal estate should pay the legacy, and it was claimed that the personal estate was exonerated and the legacy charged upon the real estate, the court would have jurisdiction to determine the question because the decision would be necessary before making a decree disposing of the personal estate. Under the revised practice, the Surrogate's Court has power to construe a will in an independent proceeding, and it also has authority to order the sale of real estate to pay a legacy charged upon it. Heretofore no such authority was given, and a decision that a legacy was charged upon real estate could not be enforced.

¶ 444 Where Real Estate is Converted into Personalty, It is Distributable as Such. See ¶¶ 203, 209.

The surrogate may decide that by the terms of the will the real estate is converted into personalty and direct the executor to account for the rents and profits and for the proceeds of sale as personal estate. See ¶¶ 203, 209.

A widow who receives one-third of the personal estate by the will is entitled to that part of the proceeds of real estate converted

into personalty by an imperative power of sale. *Matter of Caldwell*, 188 N. Y. 115, mod'g, 114 App. Div. 906.

Where there is a general conversion of real estate into personalty the decree may provide for the payment of debts from such proceeds although the time during which such debts are a lien upon real estate (§ 2702) has expired, since the decree rests upon the conversion, and not upon the lien. *Matter of Fuller*, 86 Hun, 47, 33 N. Y. Supp. 194, 66 N. Y. St. Repr. 823.

Where real estate is converted into personalty under an imperative power of sale the proceeds become personal estate to be accounted for upon judicial settlement in this State. *Matter of Newell*, 38 Misc. Rep. 563.

Life estate.

Where by the will a life estate is created, the life tenant can not take a gross sum under Sup. Ct. Rule 70, if the fund is not "paid into court." *Matter of Shadbolt*, 72 Misc. Rep. 591.

¶ 445 Decree May Construe Antenuptial Agreements.

Contracts in contemplation of marriage.

A contract made between persons in contemplation of marriage remains in full force after the marriage takes place.

§ 53, Domestic Relations Law.

Liability of husband for antenuptial debts.

A husband who acquires property of his wife by antenuptial contract or otherwise is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

§ 54, Domestic Relations Law.

Antenuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, like dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. *Matter of Young*, 27 Hun, 54; aff'd, 92 N. Y. 235; *Johnston v. Spicer*, 107 id. 185.

No special formality is requisite in such instruments, and, in order to effectuate the intentions of the parties, courts of equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will agree to their specific performance, and when such relief is inadequate or impracticable from the situation of the property or the character of the contract will award damages for its breach. *De Barante v. Gott*, 6 Barb. 496; *Peck v. Vandemark*, 99 N. Y. 29; *Pierce v. Pierce*, 71 id. 154-156. It is entirely immaterial whether a trustee, to carry it into effect, has been appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired, if the contract is fair and reasonable and such as it is lawful for the parties to make, and the rights of creditors and third persons have not intervened, it will be enforced in equity in such a manner as to accomplish the object which the parties had in view, without reference to the validity of the agreement at law. *Blanchard v. Blood*, 2 Barb. 354; *De Barante v. Gott*, 6 id. 496.

In *Peck v. Vandemark* (99 N. Y. 29), it was held that an antenuptial agreement was established by the letters of the parties to the effect that the intending husband would, in case the plaintiff intermarried with him, make provision by giving her by will one-half of his property, and the use of the other half for her life. The parties having intermarried and the husband failing to make the provision agreed upon, it was held that this was a valid contract binding upon the testator, and the plaintiff could maintain an action against the executor to recover damages for the violation of the contract. The damages were held to be the value of one-half of the estate, both real and personal, absolutely, after paying debts and expenses of administration, and the use of the other half during her life.

It has been the constant practice of the courts of this country, as well as of England, to enforce antenuptial agreements according to their terms, whether they relate to existing or after-acquired property, and to decree a specific or substituted performance of

them according to the nature of the case. *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Reade v. Livingston*, id. 481; *Johnston v. Spicer*, 107 N. Y. 191-194.

Antenuptial agreement made by infant.

An antenuptial contract made by an infant and not disaffirmed after arriving at full age is valid and will be enforced. *Beardsley v. Hotchkiss*, 96 N. Y. 201.

Oral contract invalid.

An oral promise by a woman in a conversation with her intended husband to make him equal with her in her property, by making a division of that which belonged to her, cannot be enforced as an antenuptial contract. *Lamb v. Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219.

An oral antenuptial agreement cannot be taken out of the Statute of Frauds by the subsequent marriage of the parties. *Hunt v. Hunt*, 171 N. Y. 396; aff'g, 53 App. Div. 430, 66 N. Y. Supp. 957.

Jurisdiction of surrogate to enforce antenuptial agreements.

The surrogate has jurisdiction to pass upon an antenuptial agreement, since in deciding the respective rights and interests of parties before him he must necessarily in many instances pass upon the character of the title derived by such persons, and if in so doing there appear to be documents before him, then it is necessary to determine whether under such documents the persons are properly vested with the title to the property in question. *Matter of Davenport (White)*, 37 Misc. Rep. 179, 74 N. Y. Supp. 940.

Surrogate has jurisdiction to determine whether an antenuptial agreement between husband and wife releases all claim to set-off of specific articles. *Matter of Young*, 92 N. Y. 235.

Surrogate held the antenuptial contract to be legal and to bar the widow of her distributive share, and he decreed accordingly. The General Term and Court of Appeals modified this decree on the ground that the contract was procured by fraud, etc., but

the jurisdiction of the surrogate was not questioned. *Pierce v. Pierce*, 71 N. Y. 154.

Judicial settlement of estate of intestate — widow alleged that an antenuptial agreement which it was claimed restricted her rights as widow was null and void for fraud, etc.— *held* that the surrogate had jurisdiction to determine the question involved. *Matter of Jones*, 3 Misc. Rep. 586, 24 N. Y. Supp. 706.

Where a husband or wife claims that the other has disposed of the estate by will contrary to the provisions of an antenuptial agreement, such right of disposition should be challenged on the judicial settlement when the surrogate can determine the question before making a decree. *Phalen v. U. S. Trust Co.*, 100 App. Div. 264; *rev'g*, 44 Misc. Rep. 57.

It is the duty of the surrogate to pass upon the accounts of the representative and to make a decree settling them and directing a distribution of the estate.

To accomplish the primary object he has such incidental powers as will enable him to perform his whole duty. *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795. To this end he may consider and construe an antenuptial agreement.

Antenuptial agreements construed.

Antenuptial agreement that wife should have no share in personal estate does not prevent her having the proceeds of insurance made payable to husband's executors "for benefit of widow." *Van Dermoor v. Van Dermoor*, 80 Hun, 107, 61 N. Y. St. Repr. 770, 30 N. Y. Supp. 19.

Agreement held to cut off curtesy of husband in lands of which the wife died seized. *White v. White*, 20 Misc. Rep. 481, 46 N. Y. Supp. 658; *aff'd*, 20 App. Div. 560, 47 N. Y. Supp. 273.

An antenuptial contract preserving the woman's real estate for her heirs, free from right of husband, may be enforced by her child. *White v. White*, 20 App. Div. 560, 47 N. Y. Supp. 273.

Antenuptial agreement to pay intended wife \$500, and if any of that sum was left at her husband's death she promised to return the same to his heirs — *held*, that no balance would be found

until the debts of the wife were paid. *Palmer v. Hallock*, 94 App. Div. 485.

Contract by intended wife to release all claim upon estate of intended husband. Burden of proof is upon husband's representatives to show that it was entirely fair and equitable. *Pierce v. Pierce*, 71 N. Y. 154.

It will not in all cases be assumed that a woman about to marry a man is the weaker party and that there is a presumption of undue influence. *Greene v. Crane (Benham)*, 57 App. Div. 9, 68 N. Y. Supp. 248.

The agreement may or may not be in lieu of dower.

The court in *Matter of Gorden* (172 N. Y. 25) quote the rule that "where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds," and if this rule is applied to the contract before us, and its language is given its most obvious meaning, the defendant was entitled to succeed in her contention. *Brown v. Brown*, 117 App. Div. 199.

Cannot be evaded by different testamentary provision.

In *Washburn v. Weeks* (44 N. Y. St. Repr. 922), a testator had obligated himself by a marriage settlement to give his wife by will \$4,000 and the use of \$4,000 more. He left her the use of \$4,000 with power to use the principal. The General Term, Second Department, Justice Barnard writing the decision, held, that payment of the obligation was not established even if the wife said she was satisfied. Her rights were independent of the will. Nothing but payment or release, with full knowledge of the facts, would satisfy.

In *Peck v. Vandemark* (99 N. Y. 29), the testator sought to evade his antenuptial agreement to leave one-half of his estate to his wife by a provision in his will, and the court held that the agreement was unaffected.

¶ 446 Decree of Judicial Settlement Should Protect Rights of After-Born Child. See ¶ 39.

The rule that a child born after the making of a will, unless such child is provided for in such will or in some other manner is not deprived thereby of his legal rights in the estate of the testator, is likely to be ignored upon judicial settlement.

In cases where the entire estate is given to the widow and the child has been born since the making of the will, there is often no desire on the part of any of the children, if they are adults, to appear by counsel and the fact that the child has been so born is never made known to the court.

In this manner many titles to real estate may have become affected and much personal property may have been distributed in an illegal manner.

Great care should, therefore, be exercised by both court and counsel to ascertain the date of the birth of the last child of the testator and to compare it with the date of the will before making the final decree on judicial settlement.

After-born child, if unprovided for, to have portion of estate.

Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

§ 26, Decedent Estate Law.

If the estate given by the will vests in the after-born child, it is a "provision" required by the statute even though it be inadequate in the opinion of the court. *Minot v. Minot*, 17 App. Div. 521, 45 N. Y. Supp. 554.

Where a codicil was added making provision for a child born after making the will, and other children were born and no further change made,—*held*, that such other children were not pro-

vided for. *Tavshanjian v. Abbott*, 130 App. Div. 863; aff'd, 200 N. Y. 374.

Will made disposing of whole estate with power of sale. Child born after making of will, she being only heir — *held*, that the will and power of sale were nullified. *Smith v. Robertson*, 89 N. Y. 555.

Birth of a child does not operate to revoke a will. It merely renders it inoperative as to that portion of the estate, which, if the parent had died intestate, would have been distributed to the child as next of kin. The executor named has the right to letters and to administer the personal estate, for the purpose of paying the debts and making distribution under the statute and the will so far as it remains in force. *Matter of Murphy*, 144 N. Y. 557; *Smith v. Robertson*, 89 id. 555.

Where real estate descends by the statute to an after-born child, a power of sale contained in a will fails. *Smith v. Robertson*, 89 N. Y. 555.

Where the provision in the will excludes a child born after the father's death and includes others born before, the after-born child is not mentioned in the will so as to be excluded from his natural rights. *Stachelberg v. Stachelberg*, 124 App. Div. 233; rev'g, 52 Misc. Rep. 25; aff'd, 192 N. Y. 576.

Will of a woman then pregnant did not provide for after-born child although no disposition was made of personal estate, — *held*, that the right of such child as heir to real estate was not defeated. *McCrum v. McCrum*, 141 App. Div. 83.

Provision to be made through wife.

Where the only mention or provision is that the handing on of the property to *our* children is trusted to the wife, to whom all property is given, it is not a provision for an after-born child. *Crocker v. Mulligan*, 154 App. Div. 711; but see *Wormser v. Croce*, 120 App. Div. 287, 104 N. Y. Supp. 1090.

UNPROVIDED FOR BY ANY SETTLEMENT, means a settlement made by the testator and not by some other person. *Matter of Bostwick*, 78 Misc. Rep. 695.

Failure to provide must appear.

The fact that the testator died leaving the child "unprovided for by any settlement" must appear before the statute applies. The policy of the statute is provision for such a child who is thus unprovided for outside of the will and neither provided for nor in any way mentioned in the will; not for such a child who may have been provided for by a settlement, and yet is not provided for or is not in any way mentioned in the will. For, of course, the parent might have made fair and just provision for the child outside of any testamentary provision. *Matter of Huiell*, 6 Dem. 354, 15 N. Y. St. Repr. 715; *Obecney v. Goetz*, 116 App. Div. 811.

Rights of after-born persons in same class.

Bequest in trust for grandchildren (naming them) held to include an after-born grandchild. *Matter of Butler*, 50 Misc. Rep. 229.

The Amendment of 1869 Does Not Affect Wills Made Before That Time, Where the Death Occurs After That Date. See ¶ 39.

The statute (R. S., pt. 2, chap. 6, title. 1, art. 3, § 49) was amended by chapter 22 of the Laws of 1869 by substituting the word "parent" in place of the word "father."

The saving statute found in section 93 (70), 3 R. S. (5th ed.), 153 "The provisions of this title shall not be construed to impair the validity of the execution of any will made before this chapter shall take effect or to affect the construction of any such will," does not apply to this amendment, but the amendment is valid as to all wills where the testator dies after the amendment takes effect. *Obecney v. Goetz*, 116 App. Div. 809.

The statute which allows a child, born, after the making of a will, to take a portion of his father's estate as if there had been no will does not apply to the will of a married woman who died before the amendment of 1869. *Cotheal v. Cotheal*, 40 N. Y. 405.

¶ 447 Decree Should Protect the Estate From an Inadvertent or Intentional Payment of a Legacy to a Witness to the Will Who has Forfeited His Legacy by Becoming a Witness on Probate. See ¶ 283.

Before passing the accounts of an executor, or making a decree thereon the surrogate should ascertain whether a legatee has forfeited his legacy by reason of having been called as a necessary witness on the probate of a will, and if necessary prevent by such decree an evasion of the law, which often the accounting party is more than willing to do. Such witness is also entitled to the protection of the court so far as his rights are concerned. The decree may possibly adjust these rights and so save an action to enforce the claim of the witness as provided in the following provisions of the Decedent Estate Law:

Devise or bequest to subscribing witness.

If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will can not be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

§ 27, Decedent Estate Law.

Witness to will who forfeits his interest, or an after-born child may maintain action to recover his share of the estate. See ¶¶ 33, 446.

A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or

partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

§ 28, Decedent Estate Law.

¶ 448 Decree Should Adjust Advancements.

Adjustment of advancements.

Where there is a surplus of personal property to be distributed, and the advancement as provided in section 99 of the decedent estate law, consisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the surrogate's court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree, is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation.

Former § 2733.

§ 2738, Code Civ. Pro.

Supplemental citation in adjusting advancements.

For that purpose, if any person to be affected by the decree, is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation.

From § 2738, Code Civ. Pro.

How advancements adjusted.

When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

§ 97, Decedent Estate Law.

Advancements of personal estates.

If any child of such deceased person shall have been advanced by the deceased by settlement or portion, real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of the surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much

only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs.

§ 99, Decedent Estate Law.

Advancement; personal and real property.

If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power, in trust, with a right of selection is an advancement.

§ 96, Decedent Estate Law.

The law relating to advancements does not apply to real estate situated outside this State. *McRea v. McRea*, 3 Bradf. 199.

Advancement Defined and Illustrated.

Doubtless, as was said by Johnson, J., in *Chase v. Ewing* (51 Barb. 597, 612), the word "advance" more properly characterizes "a loan or a gift of money advanced to be repaid conditionally," as distinguished from the word "advancement," which designates "money or property given by a father to his children as a portion of his estate and to be taken into account in the final partition or distribution thereof." The word "ad-

vance" has been used loosely, however, by the courts to mean "advancement." *Lawrence v. Lindsay*, 68 N. Y. 108; *Bowran v. Kent*, 51 Misc. Rep. 136; *Eberling v. Eberling*, 61 Misc. Rep. 537.

"Children" as used in the Statute of Distribution, in reference to advancements, includes descendants. *Beebe v. Estabrook*, 79 N. Y. 246.

Advancement in intestacy.

The descendants of a child of intestate who died before him are entitled, in the final distribution of his estate, to the benefit of advancements made by him in his lifetime to his other children. The word "children" as used in such section includes all the descendants of the intestate entitled to share in his estate. *Beebe v. Estabrook*, 79 N. Y. 246.

The fact of advancements being made must be proved, and entries in a book standing alone are not sufficient proof thereof. *Hicks v. Gildersleeve*, 4 Abb. Pr. 1.

Advancements in case of testacy.

A gift to a child will not be held to be an advancement when it expressly appears to have been the intention of the father that it should not be considered as such. *Matter of Morgan*, 104 N. Y. 74.

It has been held in this State that a subsequent bequest to a legatee, to whom the testator had made an "advance" or "advancement" upon his or her "apportionment" or "portion," operates to deprive such "advance" or "advancement" of the effect which it has in the event of intestacy, and prevents such "advance" or "advancement" from becoming a charge upon the legacy. In *Camp v. Camp* (18 Hun, 217), the testator, who had advanced various sums to his ten children and taken receipts therefor, acknowledging such sums as part of the recipient's "apportionment," in a subsequent will directed his executors to sell his estate and divide the proceeds equally among his ten children. The court held that these advancements should not

come into account in the division and said (p. 218): "He had provided that if he should die intestate these advancements would be charged to the parties on the distribution of his estate. But he was clearly at liberty to change his intention in that respect, if such had been his intention. And the way to effect such change was to make a will dividing the property of which he would be the owner at his death equally among his children. This he did." Similarly in *Arnold v. Haronn* (43 Hun, 278), the testator had advanced to his daughter a sum which was to be deducted from her part of his estate and to be charged to her portion. In a subsequent will the testator left to this daughter the income of four-fifths of his residuary estate for life. The court held that this advancement should not be deducted from the gift to the daughter. *Bowran v. Kent*, 51 Misc. Rep. 136; rev'd, 120 App. Div. 74, which was rev'd 190 N. Y. 422.

Rule of ademption. See ¶ 267.

The principle of ademption for advancement does not apply to residuary legatees. *Hays v. Hibbard*, 3 Redf. 28.

The rule of ademption relates only to legacies of personal estate and is not applicable to devises of realty. *Burnham v. Comfort*, 108 N. Y. 535.

Advancements, loans or gifts.

The will contained a clause that any money or property received by the legatee in testator's lifetime should be a gift and not an advancement. A note held by testator was considered a debt and to be deducted from the legacy. *Matter of Cramer*, 43 Misc. Rep. 494, 89 N. Y. Supp. 470.

Statement in the will that notes against sons shall be considered as their legacies in whole or in part — *held*, not to be an advancement. *Ritch v. Hawxhurst*, 114 N. Y. 512; aff'g, 1 N. Y. St. Repr. 563.

The will provided for deduction of charges found in testator's books — *held*, that such deductions should be made, unless there

was evidence that they were intended as gifts. *In re Twombly*, 24 Misc. Rep. 51, 53 N. Y. Supp. 385.

The will did not mention the deduction of an advancement, but a deduction was sought to be made for an account found in testator's books — *held*, that such account must be proved as an advancement. *Marsh v. Brown*, 18 Hun, 319.

Where a will was made subsequent to the advancements, and no mention of the advancements made in the will, it was held that the testator did not intend the advancements to be deducted. *Camp v. Camp*, 18 Hun, 217.

Under this will it was held that the provision means actual indebtedness that might be enforced and not charges showing gifts. *Matter of Robert*, 111 N. Y. 372; *rev'g*, 3 N. Y. St. Repr. 330.

A direction in a will that no deduction should be made for sums theretofore advanced — *held*, not to apply to sums theretofore loaned and advanced. *Rogers v. Rogers*, 153 N. Y. 343.

Whether a loan or an advancement. *Eisner v. Koehler*, 1 Dem. 277; *Bruce v. Griscom*, 9 Hun, 280; *aff'd*, 70 N. Y. 612.

Where a legacy was given for the purpose of enabling a son to go into business, and before his death the testator gave the son money to go into business — *held*, an advancement. *Matter of Weiss*, 39 Misc. Rep. 71.

Effect of entry in account-books.

A mere entry by a testator in one of his books is not sufficient to show that he has made an advancement to one of his children unless the fact of such advancement be established by other evidence. *Marsh v. Brown*, 18 Hun, 319.

Books of a firm of which testator was a member — *held* to be "my books" under a clause of a will as to advancements. *Lawrence v. Lindsay*, 68 N. Y. 108; *Lawrence v. Lawrence*, 4 Redf. 278.

A direction to deduct the amount of all charges appearing on the testator's books — *held*, valid. *Robert v. Corning*, 89 N. Y. 225.

Declarations of deceased.

Declaration of decedent as to whether property which had been theretofore transferred to a child was a gift or advancement, not competent.

Declarations of the husband of deceased made when giving a certificate of deposit to his daughter that the gift is from him and not from the mother are competent as part of the *res gestae*. *Johnson v. Cole*, 178 N. Y. 367; rev'g, 76 App. Div. 606, 78 N. Y. Supp. 489.

Interest.

Advancements will not draw interest unless the proof is such that they must be held to be a debt, or unless the subject is mentioned in a will charging them. *Verplanck v. De Went*, 10 Hun, 611; *Matter of Keenan*, 15 Misc. Rep. 368, 72 N. Y. St. Repr. 823, 38 N. Y. Supp. 426; *Matter of Oakey*, 1 Bradf. 281.

Under an agreement between a father and son the executors of the former were given the right to treat the sum so paid by the father to the son as an advancement or as a debt—*held*, that when they elected to treat it as a debt interest accrued from that time. *Cole v. Andrews*, 176 N. Y. 374; aff'g, 83 App. Div. 285, 82 N. Y. Supp. 152.

Where the indebtedness consisted of notes, simple interest was computed. *Matter of Downs*, 39 Misc. Rep. 621.

CHAPTER LVII.

Final Judicial Settlement, Continued; Decree of Judicial Settlement and of Distribution.

- ¶ 449. Distribution in case of partial intestacy.
- ¶ 450. § 98 (D. E.). Order of distribution.
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Distribution to widow.
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Subjects of foreign countries.
- ¶ 459. Distribution of accrued pension.
- ¶ 460. Distribution under residuary clause.
- ¶ 461. Distribution where residuary gift lapses.
- ¶ 462. Distribution where persons perish by common disaster.
- ¶ 463. Distribution where legatee or distributee has died.

¶ 449 Decree of Distribution in Cases of Intestacy, or Partial Intestacy. See ¶ 461.

Where no will is left, personal property must be distributed among the surviving widow or husband or next of kin in accordance with the law of distribution of personal property. The real estate left by an intestate descends at once upon his death to his heirs-at-law, who may or may not be his next of kin. The administrator does not account for any part of the real estate, but the surplus of the personal estate after payment of debts and expenses must be distributed to those entitled thereto under the decree of judicial settlement.

Next of kin ascertained as of date of death.

It is well settled in this State that where any part of an estate passes to the heirs-at-law or next of kin of the testator by reason of intestacy as to such portion, the heirs-at-law and next of kin are to be determined as of the date of the testator's death. *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; *Doane v. Mercantile Trust Co.*, 160 N. Y. 494; *Clark v. Cammann*, id. 315; *Simonson v. Waller*, 9 App. Div. 503. The only expression contrary to this rule is contained in *Savage v. Burnham* (17 N. Y. 561), in connection with a merely incidental question not referred to by the counsel of any of the parties before the court. Upon this point, however, this case has been substantially overruled by subsequent decisions of the same court. *Doane v. Mercantile Trust Co.*, *Clark v. Cammann*, and *Simonson v. Waller* (*supra*); *Grinnell v. Howland*, 51 Misc. Rep. 132; *Matter of Brooklyn T. Co.*, 76 Misc. Rep. 110.

Decree in case of partial intestacy.

Intestacy exists as to everything not disposed of, or which turns out not to be disposed of by the will, whether by reason of the inability of an attempted disposition or other accident; and personal property not disposed of by the will must be distributed under the Statute of Distribution. *Clark v. Cammann*, 160 N. Y. 315; *aff'g*, 14 App. Div. 127; *Lefevre v. Lefevre*, 59 N. Y. 434.

The executor has the custody, control, and distribution of unbequeathed assets and not an administrator to be appointed. *Matter of Haughton*, 37 Misc. Rep. 457.

Testator failed to dispose of the remainder of a trust fund, and left a widow and unmarried daughter. The daughter died during the life of the widow without issue — *held*, that the trust fund was unbequeathed and went to the widow. *Pomroy v. Hincks*, 180 N. Y. 73; *aff'g*, 74 App. Div. 298.

Legatees may object to validity of other legacies.

Legatees whose legacies are valid may raise the objection that other legacies are invalid where such a decision would create partial intestacy for the benefit of such legatees. *Matter of Morgan*, 56 Misc. Rep. 235.

¶ 450 Order of Distribution in Cases of Intestacy.

If the deceased died intestate, the surplus of his personal property after payments of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, or any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow

shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals after brothers and sisters' descendants. (This subdivision shall not apply to the estate of a decedent who shall have died prior to May 18, 1905.)

13. Relatives of the half-blood, shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the life-time of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

15-a. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be allotted to a surviving child of the husband or wife of the deceased, or if there be more than one, it shall be distributed equally among them.

16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, and no child or children of the husband or wife of the deceased, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in chapter eighteen of the code of civil procedure; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the

deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person.

§ 98, Decedent Estate Law.

Estates of married women. See ¶ 454.

The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more.

§ 100, Decedent Estate Law.

It will be noticed that this section applies only in cases where married women die leaving descendants; where no descendants are left the husband takes all the personal estate under the common law rule. See ¶ 454.

Who are next of kin. See also § 1870 Code Civ. Pro.

The term next of kin includes all those entitled under the provision of law relating to the distribution of personal property to share in the unbequeathed residue of the assets of the decedent after payment of debts and expenses other than a surviving husband and wife.

§ 2768, subd. 12, Code Civ. Pro.

Those persons who are entitled in any given case to share in the distribution of personal property are specified in Decedent Estate Law, section 98.

The next of kin of any given person are those who stand in the nearest relation to him and who also would share in the distribution of the surplus of his personal property, and they are in a general way as follows:

1. His living children and the descendants of such as are dead.
2. The father.
3. The mother and the brothers and sisters of the intestate and the descendants of such as are dead.
4. The brothers and sisters and the descendants of such as are dead.
5. Grandparents.

6. Uncles and aunts.

7. Cousins.

Next of kin of the half blood take with those of the whole blood from a common ancestor. See ¶ 453.

The term next of kin does not include the widow of a testator in the absence of any intention to include her in the class which the term is employed to designate. *U. S. Trust Co. v. Miller*, 57 Misc. Rep. 500.

¶ 451 In What Proportions Distribution is Made; Per Capita and Per Stirpes.

Where the persons to whom distribution is to be made are of equal degree to the deceased, distribution is made equally, *per capita*. Subd. 10, § 98, Decedent Estate Law.

When such descendants or next of kin are of unequal degree of kindred, distribution is made according to their respective stocks; so that those in the nearest degree, and who consequently take in their own right, take equally, *per capita*; and those who take by representation, that is through the death of a deceased person belonging to the nearest class who take, shall receive the share to which the parent whom they represent, if living, would have been entitled, divided *per capita* among those of equal degree, and in the same manner to those of unequal degree; *id.*, *subd.* 11.

Where division is made equally among those who take in their own right, it is called *per capita*; where it is made unequally to those who take by representation, it is called *per stirpes*.

Taking by representation. See ¶ 453.

Any person may take by representation from his deceased father or mother and their lineal descendants down to his own degree; *id.*, *subd.* 1.

And when entitled to take from a deceased brother or sister he may take down to his own degree; *id.*, *subd.* 12.

In other words lineal descendants take to the remotest degree,

the share a parent would have taken had he or she been alive at the time of distribution, and in the same way, brothers and sisters, who are entitled to take at all, and their descendants take to the remotest degree.

It is only where there are no lineal descendants, or brother or sister or their descendants, that uncles and aunts take, and among these remoter degrees, uncles, aunts and cousins there is no taking by representation, that is there is no distribution *per stirpes* to those of unequal degrees, those of equal degree taking the whole estate.

Distribution per stirpes or per capita.

The general rule is that a gift to a person described as standing in a certain relation to the testator and to the children of another standing in the same relation, imports an intention that the legatees shall take *per capita*. *Woodward v. James*, 115 N. Y. 346; *Coster v. Butler*, 63 How. Pr. 311; *Train v. Davis*, 49 Misc. Rep. 162; *Kernochan v. Whitney*, 125 App. Div. 371.

But a gift to a person described as standing in a certain relation to the testator, and to *the heirs* of another person standing in the same relation to him imports an intention upon the part of a testator that the persons named and described shall take *per stirpes*. *Matter of Griswold*, 42 Misc. Rep. 230; *Bayley v. Beekman*, 62 Misc. Rep. 568.

The word "issue" in a strictly technical meaning is equivalent to the word "descendants" and when such word is used in a will — in the absence of other words or extrinsic circumstances requiring a different meaning — entitles the remaindermen to take *per capita* and not *per stirpes*. *Kernochan v. Whitney*, 125 App. Div. 371.

In some cases the children of a living ancestor will share with the ancestor *per capita*. *Matter of Bauerdorf*, 77 Misc. Rep. 656.

Distribution per stirpes when persons of unequal degree take directly from the testator. *Dwight v. Gibb*, 150 App. Div. 573.

¶ 452 Diagram Illustrating Distribution.

This diagram shows how distribution is made in ordinary cases, but is not intended to be complete as to the unusual cases which will not admit of such treatment.

What has been previously said about taking by representation, and per capita and per stirpes must be read in connection with the diagram, as such rules are not repeated.

This diagram does not show distribution under subs. 9, 15, 15a, and 16.

If a man die, intestate, leaving a wife and children or descendants of children, distribution is represented as follows:

Widow	Child or children and their descendants
$\frac{1}{3}$ Subd. 1	$\frac{2}{3}$ Subd. 1

If he leaves a widow and a father, but no children or descendants:

Widow	Father
$\frac{1}{2}$ Subd. 7 Subd. 2	$\frac{1}{2}$ Subd. 7
	Mother and collaterals
	Nothing

If he leaves a widow, but no father or children or descendants:

Widow	Mother and brothers, sisters, and their descendants	No brother, sister	Mother	No	All to widow
$\frac{1}{2}$ Subd. 7	$\frac{1}{2}$ Subds. 2, 6	or representatives	$\frac{1}{2}$ Subd. 8	Mother	Subd. 3

If he leaves a widow, but no children or descendants, father or mother, but does leave brother or sister, nephew or niece:

Widow	Residue to brothers and sisters and descendants	Leaving no brother, sister, nephew or niece	All to widow
$\frac{1}{2}$ and \$2,000 Subd. 3	Subd. 3		Subd. 3

If he dies, leaving no widow, distribution is represented as follows:

No widow	Child or children and their descendants	Leaving no lineal descendant	Father	Leaving, no	Mother and brother and sister
	All Subd. 4		All (Subd. 7)	Father	and their descendants equally Subd. 6

No widow	No	Brother and sister and their descendants	No brother or sister or descendant, but a mother	Mother
	Mother	All Subd. 6		All Subd. 8

No widow	No kin nearer than Grandparents	No Grandparents	Uncle and aunt	No uncle or aunt	1st cousins	No 1st cousins	2nd cousins
	All Subd. 5		All Subd. 5 Subd. 12		All Subd. 5 Subd. 12		All Subd. 5 Subd. 12

If a woman dies, intestate, leaving:

Husband	Child or children and their descendants	No child or children or descendants	Husband
1/3	2/3		All, under common law
No Husband	Child or children and descendants	Continued in the same way as when a man dies	
	All		

¶ 453 The Statute Applied. See ¶ 451.

In examining the cases upon this subject it must be borne in mind that from 1898 to 1905 the limitation upon taking by representation was removed. See page 1765. It has now been restored and extended to all descendants of brothers and sisters. When none of those persons survives there is no representation allowed and the rule is as it was before the change in 1898. Representation may be allowed to the descendants of nephews and nieces and not to the descendants of uncles and aunts. Representation never changes or advances the degree; but where the degrees are unequal, it operates, when declared by the statute, to give the representative of a deceased person the share he would have taken if living. *Hurtin v. Prool*, 3 Bradf. 414.

In other words, representation only comes in to take the place of deceased members of a class of equal degree, when one or more members of that class are living and entitled to take. If all of a class who would have taken by themselves or representatives, had

any of the class survived, are deceased, the law looks to the next degree, not for representatives of the first mentioned class, but for another class, and these all take equally by themselves, or if some are deceased, by the representatives of such. *Adams v. Smith*, 20 Abb. N. C. 61, citing *Pond v. Bergh*, 10 Paige, 140.

Nephews and nieces and descendants.

The underlying principle, which is the proper basis for the decision of all such cases, is that you must first find the nearest class of relationship to the intestate, and that each one in the nearest class takes an equal share of said estate, and the representatives of any in that class who have died take the share to which the parent would have been entitled. Where the next of kin are three nephews and the child of a deceased nephew, each nephew is entitled to one-quarter of the estate, and the representative of the deceased nephew is entitled to the other fourth. *Matter of Prote*, 54 Misc. Rep. 495, 104 N. Y. Supp. 581.

Uncles and aunts.

Uncles and aunts and cousins — cousins excluded being in the fourth degree. *Matter of Nichols*, 60 Misc. Rep. 299.

Aunt and many cousins — all cousins excluded. *Matter of Youngs*, 73 Misc. Rep. 335.

Cousins.

Distribution made to first cousins, excluding second cousins on the ground that those were entitled who were nearest in relation to the deceased and of equal degree. *Adee v. Campbell*, 79 N. Y. 52; aff'g, 14 Hun, 551; *Clements v. Babcock*, 26 Misc. Rep. 90, 56 N. Y. Supp. 527; *Matter of Barry*, 62 Misc. Rep. 456. The diagram stops with second cousins, but distribution does not.

Grandparents.

When grandparents are in the nearest degree they take. *Hill v. Nye*, 17 Hun, 457; *Simmons v. Burrell*, 8 Misc. Rep. 405, 59 N. Y. St. Repr. 554, 565; *Matter of Davenport*, 36 Misc. Rep. 476, 73 N. Y. Supp. 811.

Those of the half-blood take. See § 98, subd. 13, Decedent Estate Law.

Nephews and nieces of the whole and of the half-blood share equally. *Matter of Southworth*, 6 Dem. 216, 14 N. Y. St. Repr. 486.

Mother, and sister of the half-blood take equally. *Matter of Cruger*, 68 N. Y. St. Repr. 241, 34 N. Y. Supp. 191.

Distribution to Widow.

The amendment to subdivision 12 certainly did not contemplate any change of the provisions which define the widow's share in the personal estate. Subdivision 3 is explicit in prescribing the extent of her interest where there is "no descendant, parent, brother or sister, nephew or niece." Subdivision 12 does not purport to lessen or alter her share. That subdivision and those immediately preceding pertain to the distribution among next of kin who are collaterals and who are related by consanguinity to the person from whom they take. The widow takes by virtue of her widowhood, and the extent of her interest in whatever aspect the estate of her husband may be presented as to his next of kin is prescribed by the various subdivisions of section 98 of the Decedent Estate Law. The Legislature did not intend to modify these provisions so long in vogue by changing the subdivisions relating exclusively to representation among collaterals. In order to obtain that result we must read into the definite language of subdivision 3 a later subdivision, and one which in no way by its express language lessens the share of the widow. If so great a change had been designed, subdivision 3 would have been amended and remodeled. *Matter of Hardin*, 97 App. Div. 493; aff'g, 44 Misc. Rep. 441, 90 N. Y. Supp. 95; aff'd, 181 N. Y. 513.

Right of widow in undisposed-of assets.

An annuity given in lieu of dower does not bar a widow's claim to personal estate arising from any statute or from any other source. *Hatch v. Bassett*, 52 N. Y. 359.

Where testator gives his widow a sum in lieu of dower and of all claims she may have against his estate as his widow, and she

accepts the same, she is not entitled to a share of lapsed legacies. *Bullard v. Benson*, 1 Dem. 486, 43 N. Y. 443, 79 id. 346.

Where a widow is given a bequest not stated to be in lieu of dower, she may share in any undisposed-of assets. *Lefevre v. Lefevre*, 59 N. Y. 434.

Distribution Where a Person Died Between September 1, 1898, and May 18, 1905.

Taking effect September 1, 1898, subd. 12 of section 2732, Code Civ. Pro., was amended so as to admit representation among collaterals in the same manner as allowed by law in reference to real estate. During the seven years before subdivisions 5 and 12 were amended in 1905, this section as amended in 1898 received conflicting construction.

In *Matter of Healy* (27 Misc. Rep. 352, 58 N. Y. Supp. 927), the question arose as to whether grandnephews should be cited in probate proceedings as interested persons when there were an uncle and nephew surviving, and it was held that they were interested persons. But this case was practically overruled in *Matter of Davenport*, 67 App. Div. 191, 73 N. Y. Supp. 653; aff'd, 172 N. Y. 454.

In *Matter of Thompson* (41 Misc. Rep. 223, 83 N. Y. Supp. 983), there were nephew and niece, uncle and aunt and cousins, and it was held that the cousins were not interested parties. Aff'd, 87 App. Div. 609, 83 N. Y. Supp. 1117.

The statute applied.

Distribution made to grandnephew and first cousins, all being in the fourth degree. *Matter of Martin*, 95 App. Div. 926; appeal dismissed 179 N. Y. 566.

Nephews and nieces and first cousins — cousins excluded. *Matter of Hoes*, 119 App. Div. 288.

Aunts and cousins. *Matter of Dunning*, 48 Misc. Rep. 482.

Grandmother, two aunts, cousin, and half-uncle. Estate was

divided among the grandmother and descendants of deceased grandfather. *Matter of Davenport*, 36 Misc. Rep. 475, 73 N. Y. Supp. 810.

Cousins excluded, there being nearer next of kin. *Matter of Davenport*, 67 App. Div. 191, 172 N. Y. 454, 73 N. Y. Supp. 653.

Nephew and niece and grandnephew—*held*, that grand-nephews were entitled to share. *Matter of Ebbets*, 43 Misc. Rep. 575, 89 N. Y. Supp. 544; *Matter of Hadley*, 43 Misc. Rep. 579, 89 N. Y. Supp. 545; *Matter of Fleming*, 48 Misc. Rep. 589.

Distribution made among first cousins and the representatives of deceased first cousins when cousins were the nearest of kin. *Matter of N. Y. Security & Trust Co.*, 46 Misc. Rep. 224.

The rule deduced from the decisions and applied in *Matter of Hadley* (43 Misc. Rep. 579) was as follows: Distribution shall be made among the nearest next of kin in equal degree to the deceased so that their shares shall be equal. Should there have been any brother or sister or descendant of brother or sister to the remotest degree who would have been of the degree of kinship so entitled to share equally had he or she survived the deceased, his or her representatives shall share by representation in such distribution *per stirpes*; but descendants of an uncle or aunt whose ancestors might have been so entitled to share shall not share by representation while there are descendants of a brother or sister in any degree surviving, but may share *per stirpes* when there are no brothers or sisters or their descendants surviving.

¶ 454 Distribution of the Estates of Married Women.

The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women, dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more.

§ 100, Decedent Estate Law.

Where a married woman leaves a husband but no lineal descendants, the husband becomes vested with the title to all her personal estate and he need not take out letters of administration.

He does not obtain his right to her personal property through the intestate law, but by reason of the marital relation. *Matter of Green*, 68 Misc. Rep. 1.

If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor.

A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband.

§ 103, Decedent Estate Law.

A husband who acquires property of his wife by antenuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

§ 54, Domestic Relations Law.

Where no descendants are left.

On the death of a married woman intestate and leaving no descendants, her entire personal estate passes to and vests in her husband, by virtue of his marital rights, the rule of distribution in such a case remaining as at common law, and not being changed by any of the statutes affecting the estates of married women. The husband is entitled to letters of administration if he elects to demand them, but his title to the personalty of the wife does not in any degree rest upon such letters, and the assets of her estate pass absolutely to him whether reduced to possession or not, without the issue of letters. *In re Bolton*, 159 N. Y. 129; *Robins v. McClure*, 100 id. 328; *In re Negus (Nones)*, 27 Misc. Rep. 165, 58 N. Y. Supp. 377; *In re McLeod*, 32 Misc. Rep. 229, 66 N. Y. Supp. 255.

Husband and wife are not heirs or next of kin to each other. *Platt v. Mickle*, 137 N. Y. 106.

Upon the death of a wife intestate, without descendants, her

husband becomes entitled to all her personal estate remaining after payment of debts. *Barnes v. Underwood*, 47 N. Y. 351.

The personal estate of a married woman dying intestate, without lineal next of kin, belongs absolutely to her husband, and cannot be affected by grant of administration to another. *Ransom v. Nichols*, 22 N. Y. 110.

The husband takes the personal estate of his deceased wife where she has no descendants and dies intestate in whole or in part. *Robins v. McClure*, 100 N. Y. 328.

Estate of married woman leaving a husband and descendants.

The case of a married woman dying leaving a husband and descendants is provided for in section 100, Decedent Estate Law. The husband in such a case takes the same interest in the wife's estate as she takes in his. But where no descendants of the wife are left the husband takes all of her personal estate by the terms of the common law, and not under the Statute of Distribution. *Matter of Starbuck*, 137 App. Div. 866; *Matter of Green*, 144 App. Div. 232.

¶ 455 Distribution Where Either Husband or Wife is Divorced.

Husband plaintiff.

Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property or to a distributive share in his personal property.

§ 1760, subd. 3, Code Civ. Pro.

Wife plaintiff.

Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower in any real property of which the defendant then is or was theretofore seized is not affected by the judgment.

§ 1759, subd. 4, Code Civ. Pro.

Reason for the rule.

For the reason that future rights, dependent for their origin upon the marriage relation, cannot arise after its dissolution, and which prevent the innocent wife from having dower in her husband's after-acquired lands, it follows that she can have no dis-

tributive share in his personalty. At the date of the decree she has no existing rights in his personal estate. That is his. No fraction of it and no lien upon it are hers. He may sell without her consent, give it away if he pleases, and bequeath it at his own choice. If it remains his at his death then the wife, if the marriage relation exists, and has not been sundered, becomes "the widow" named in the Statute of Distribution, and at that moment, for the first time, arises her right in the personal estate dependent upon the existence of the marriage at the husband's death. Administration is given first, "to the widow." The law contemplates the possible existence of but one, and makes no provision for a struggle of priority between two or more. To "the widow" is given one-third of the personal estate, and all other provisions allowing her occupation of her husband's house and setting apart for her specific articles of household use indicate the understanding of the Legislature that she only was "the widow" who held to the deceased, at the date of his decease, the relation of a wife. *Matter of Ensign*, 103 N. Y. 284.

Separation.

Where a separation by agreement or by decree exists the marriage not being dissolved the respective rights of the parties are not affected, and either husband or wife may share in the personal property of the other. *Jardine v. O'Hare*, 66 Misc. Rep. 33.

An agreement of separation and release of all interest in estate may contain parts which are contrary to public policy and so make it wholly void and thus leave the estate to be distributed according to the law. *Matter of Kopf*, 73 Misc. Rep. 198.

¶ 456 Distribution in Cases of Invalid Marriage and Illegitimate Children. See ¶ 23.

Entitled as widower.

Where a woman lived with a man a few years without ceremonial marriage, and then had ceremonial marriage with another

and lived with him for over thirty years, a large part of the time after the death of the first husband, the second was held to be the widower and entitled to share in her estate. *Geiger v. Ryan*, 123 App. Div. 722. *

Distribution of estate of illegitimate.

Deceased, an illegitimate, left an illegitimate sister of the full blood and next of kin of the supposed father — *held*, that the sister took the estate to the exclusion of the relatives of the supposed father. *Matter of Lutz*, 43 Misc. Rep. 230, 88 N. Y. Supp. 556.

Illegitimate child.

The illegitimate child of the deceased sister of the intestate cannot share. *Matter of Lauer*, 76 Misc. Rep. 117.

Illegitimates made legitimate by marriage.

All illegitimate children whose parents have heretofore intermarried or who shall hereafter intermarry shall thereby become legitimized and shall become legitimate for all purposes and entitled to all the rights and privileges of legitimate children; but an estate or interest vested or trust created before the marriage of the parents of such child shall not be divested or affected by reason of such child being legitimized. * * *

From § 24, Domestic Relations Law.

Such issue does not become “lawful issue” within the meaning of a will giving a legacy to such children. *Central T. Co. v. Skillin*, 154 App. Div. 227.

Effect on distribution to children, of judgment dissolving or annulling a marriage.

Where a marriage is by judgment dissolved or annulled, a child born or begotten before the judgment, is deemed to be the legitimate child of the innocent party and may take real or personal property as such child. See Code Civ. Pro., § 1745.

Imprisonment for life. See ¶ 133.

A person sentenced to imprisonment for life is thereafter deemed civilly dead.

§ 511, Penal Law.

Void marriages.

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled * * *;
2. Such former husband or wife has been finally sentenced to imprisonment for life;
3. Such former husband or wife has absented * * *.

From § 6, Domestic Relations Law.

Pardon not to restore marital rights.

A pardon granted to a person sentenced to imprisonment for life within this state does not restore that person to the rights of a previous marriage or to the guardianship of a child, the issue of such a marriage.

§ 58, Domestic Relations Law.

In order to avoid a condition of polygamy it would seem that if the free party married again even a pardon would not restore marital rights so that the convict husband would share in the estate of the wife. *Glielmi v. Glielmi*, 72 Misc. Rep. 511.

¶ 457 Adopted Children and Their Right to Share in Estate.
See ¶ 22.

While adoption was early recognized by the civil law, it was not recognized by the common law and exists in the United States only by special statute; that statutes authorizing adoption, therefore, being in derogation of the common law, should be strictly construed and that it follows, as a consequence, that there is no presumption that minor children living with people whose name they have taken are to be regarded as adopted children.

Thus the statute gives to an adopted child the same legal relation to the foster-parent as a child of his body, and that relation extends to the heirs and next of kin of the child by adoption the same as to those of a child by nature. The artificial relation is given the same effect as the actual relation, so far as the right of succession is concerned, and the statutory grandchild and grandparent inherit from each other the same as if the relation had been created by nature. In other words, the Legislature has ordained that there shall be no difference in the right to inherit

between a child by adoption and his heirs and next of kin and a child by nature and his heirs and next of kin, and the courts, as in duty bound, have obeyed the command. *Dodin v. Dodin*, 16 App. Div. 42; aff'd, 162 N. Y. 635; *Von Beck v. Thomsen*, 44 App. Div. 373; aff'd, 167 N. Y. 601; *Gilliam v. Guaranty Trust Co.*, 186 id. 127; *Matter of Cook*, 187 id. 253; rev'g, 114 App. Div. 718.

Property rights where child has been legally adopted.

Thereafter the parents of the minor are relieved from all parental duties toward and of all responsibility for, and have no rights over such child, or to his property by descent or succession. * * * His rights of inheritance and succession from his natural parents remain unaffected by such adoption. * * *

The foster parent or parents and the minor sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

From § 114, Domestic Relations Law.

The right of inheritance is determinable at the time of the death of the intestate. As said by Bradley, J., in *Dodin v. Dodin* (16 App. Div. 45; aff'd, 162 N. Y. 635): "No right of inheritance before the death of an intestate arises from any relations existing between him and another. But those who, at the time of his death, come within the description of persons entitled by law to inheritance, and those only, take the relation of inheritors to his estate. The death is the event, and the conditions then existing are solely the subject of consideration in determining the right of inheritance and distribution of the estate of an intestate."

The saving clause refers to those forms of adoption theretofore existing by virtue of special statutory enactments contained in the charters of charitable societies, and does not legalize private agree-

ments executed without authority of law. *Matter of Thorne*, 155 N. Y. 140.

A child adopted under the act of 1873 becomes entitled to inherit under the act of 1887 if the foster parent is alive at the time that act goes into effect. *Dodin v. Dodin*, 16 App. Div. 42; *Theobald v. Smith*, 103 id. 200; *Gilliam v. Guaranty T. Co.*, 186 N. Y. 127.

Adoption is the taking of a stranger in the blood as one's own child. The proceeding of adoption and the relation established is personal to the foster-parent and the child. The statute gives to them all the rights to be derived from the legal relation of parent and child, including the "right of inheritance from each other." The right is not given, however, either expressly or by implication, to the child, to inherit *through* the foster-parent from his collateral kin. In other words the child becomes heir only to the foster-parent. This right of inheritance flows from the artificial relation established at the request of the one and with the consent of the other. The adoption proceedings perpetuate the desire of the parent that the child shall be *his* heir. But a stranger to the adoption proceedings, who has never recognized the existence of any artificial relation, should not have his property diverted from the natural course of descent. *Kettle v. Baxter*, 50 Misc. Rep. 428.

Difference between gift over to children, or to next of kin.

Under a deed which conveyed certain real estate to T. during life and after her death to her heirs-at-law — *held*, that an alleged child of T. was such heir-at law. *Gilliam v. Guaranty T. Co.*, 186 N. Y. 127; *aff'g*, 11 App. Div. 656.

Deed of trust to person and upon his death to his next of kin — *held*, that an adopted child took. *U. S. Trust Co. v. Hoyt*, 150 App. Div. 621.

Defeating right of remainderman.

An adopted child held not to take under a will giving property to her father and in case of his death to his children. *Matter of*

Hopkins, 102 App. Div. 458; *Matter of Leask*, 197 N. Y. 193, 90 N. E. 652.

Adoption had in other states.

It may perhaps be assumed, as it was in *N. Y. Life Ins. & Trust Co. v. Viele* (161 N. Y. 11, 18, 55 N. E. 311, 313, 76 Am. St. Rep. 238), that "the legal status of an adopted child, acquired by the law of adoption, is by the law of comity recognized in every other jurisdiction where such status becomes material in determining the right to take property by will or inheritance." The effect of this doctrine is to regard the children of foreign adoption, whose rights are to be adjudicated upon here, in the same light as though they had been duly adopted under the laws of New York. *Matter of Leask*, 197 N. Y. 193, 90 N. E. 652.

¶ 458 **Distribution of Estates of Nonresidents.**

Distribution of personal estate collected by the administrator of a nonresident will be distributed according to the law of the domicile. *Matter of Nones (Negus)*, 27 Misc. Rep. 165, 58 N. Y. Supp. 377.

Where the deceased is a nonresident the surrogate may assume that the laws of distribution in the State of his domicile are the same as in this State until proof to the contrary is made. *Bull v. Kendrick*, 4 Dem. 330.

The accession to an intestate's personal property is governed by the law of the actual domicile of the intestate at the time of his death; and it devolves upon those entitled to take it as next of kin according to the law of such actual domicile. *Matter of Ruppenner*, 15 Misc. Rep. 654, 72 N. Y. St. Repr. 680, 37 N. Y. Supp. 429; *aff'd*, 9 App. Div. 422, 75 N. Y. St. Repr. 1456, 41 N. Y. Supp. 212; *Flatauer v. Laser*, 156 App. Div. 591.

Estates of subjects of foreign countries. See ¶¶ 379, 471.

In the case of personal property, in the treaty between the United States and the King of Italy, section 22 of the commercial

treaty of 1871 provides: "The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other by a sale, donation, testament, or otherwise, and the representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country, wherein said goods are, shall be subject to pay in like cases."

Under that section the right of a counsel to take possession, in behalf of subjects of their respective countries, of personal property and to transmit it to such countries for distribution in accordance with the laws thereof is unquestionable. *Matter of Peterson*, 51 Misc. Rep. 369.

Judicial settlement of estates of Italian subjects.

Our treaty with Italy has been construed to require payment to be made to the consul-general of Italy, resident here, of all distributive shares belonging to next of kin living in Italy upon the settlement of the personal estate of an Italian subject.

The Italian consul has the right to receive on distribution the property of an Italian subject which would go to his next of kin in Italy. *Matter of Davenport*, 43 Misc. Rep. 573, 89 N. Y. Supp. 537.

The consul of Italy may be paid the distributive shares belonging to the widow and five minor children residing in Italy upon settlement of the personal estate of an Italian subject. *Matter of Tartaglio*, 12 Misc. Rep. 245, 67 N. Y. St. Repr. 825, 33 N. Y. Supp. 1121.

Subjects of other countries.

This same privilege is claimed by the consuls of Austria-Hungary, Peru, Argentine, Belgium, Germany and Russia by virtue of their treaties.

¶ 459 Distribution of Accrued Pension.

United States statute in regard to the ownership of accrued pensions.

Be it enacted, etc., That from and after the twenty-eighth day of September, eighteen hundred and ninety-two, the accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in the case of a person pensioned, or applying for pension, on account of his disabilities or service, be paid, first, to his widow; second, if there is no widow, to his child or children under the age of sixteen years at his death; third, in case of a widow, to her minor children under the age of sixteen years at her death. Such accrued pension shall not be considered a part of the assets of the estate of such deceased person, nor be liable for the payment of the debts of said estate in any case whatsoever, but shall inure to the sole and exclusive benefit of the widow or children. And if no widow or child survive such pensioner, and in the case of his last surviving child who was such minor at his death, and in case of a dependent mother, father, sister, or brother, no payment whatsoever of their accrued pension shall be made or allowed except so much as may be necessary to reimburse the person who bore the expense of their last sickness and burial, if they did not leave sufficient assets to meet such expense. And the mailing of a pension check, drawn by a pension agent in payment of a pension due, to the address of a pensioner, shall constitute payment in the event of the death of a pensioner subsequent to the execution of the voucher therefor. And all prior laws relating to the payment of accrued pension are hereby repealed.

Act of March 2, 1895, ch. 193.

¶ 460 Distribution Under Residuary Clause. See ¶ 276.

A general residuary devise carries every real interest whether known or unknown, immediate or remote, unless it is manifestly excluded. The intention to include is presumed, and an intention to exclude must appear from other parts of the will, or the residuary devisee will take. *Floyd v. Carow*, 88 N. Y. 560; *Riker v. Cornwell*, 113 id. 115.

The general proposition of law is that a general residuary bequest of personal property carries to the residuary legatee not only such estate and such interest therein as the testatrix did not attempt to dispose of by other provisions of her will, but every part of her property which by lapse or otherwise is not effectually bequeathed and disposed of to others. *Matter of Benson*, 96

N. Y. 499; *Moffett v. Elmendorf*, 152 id. 475; *Langley v. Westchester Trust Co.*, 180 id. 326; *Leggett v. Stevens*, 185 id. 79; *Matter of Barrett*, 132 App. Div. 134.

The residuary legatee is entitled to the interest on all money legacies during the year in which they must be held before payment. *Matter of Brenner (Bronner)*, 30 Misc. Rep. 31, 62 N. Y. Supp. 1003.

Cases holding that the will did not indicate that the testator intended a restricted meaning to the residuary clause. *Lamb v. Lamb*, 131 N. Y. 227; *Matter of Miner*, 146 id. 121.

Where a testator gives a legacy and then in the residuary clause uses the word "all" without limitation, the intention being apparent that he meant all the remaining property, such a construction will be given it. *Harrison v. Jewell*, 2 Dem. 37, 81 N. Y. 356, followed.

Gift of residuary estate upon condition.

Where there was a gift of the residuary estate to persons who were to have an estate for life upon accepting it with certain conditions attached, it was held that the entry into possession and acceptance of the property with its conditions vested the residuary estate without regard to the subsequent compliance with such conditions. *Matter of Hart*, 61 App. Div. 587, 70 N. Y. Supp. 933; aff'd, 168 N. Y. 640.

When the case is taken out of the general rule.

The intention to exclude a portion of the estate from the residuary estate must appear in words or in the general scheme of the will. *Langley v. Westchester Trust Co.*, 180 N. Y. 326; *Matter of Benson*, 96 N. Y. 499-510; *Kerr v. Dougherty*, 79 N. Y. 327; *Matter of Morrissey*, 72 Misc. Rep. 573.

***Matter of Dewitt*, 113 App. Div. 790, aff'd, 188 N. Y. 567.**

The will evinced a single purpose, namely, to provide for a burial lot, monument and its perpetual care; which provisions were held invalid. There was a residuary clause making a

stranger residuary legatee "as payment for his services as such executor," and it was held that the residuary legatee could not take the void legacies.

Divided pro rata among legatees.

Where the residuary estate was given to nephews and nieces in proportion to their other gifts—*held*, that "other gifts" included sums held for them in trust. *Leaski v. Richards*, 116 App. Div. 274; *aff'd*, 188 N. Y. 291.

A legacy expressed to be given to pay a legal or moral obligation of the testator does not entitle the legatee to share in the residuary estate. *Matter of Whiting*, 33 Misc. Rep. 274, 68 N. Y. Supp. 733.

A number of legatees given specific amounts, and the surplus, if any, divided *pro rata* among them—*held* as to share of one dying that it went to the survivors and not as intestate property to the next of kin. *Matter of Jones*, 75 Misc. Rep. 47

Legatees of money may receive pro rata share.

Where there is not sufficient of the fund applicable to the payment of legacies to pay all in full, distribution must be made *pro rata* among all those of the same class. Because a legacy is first given in the will it is not entitled to preference of payment on that account.

The rule of abatement of legacies must be consulted and applied in all cases where the fund is not sufficient to pay all legacies in full.

Pecuniary and specific legacies must be paid in full before the residuary legatee takes, even where there has been a devastavit and thereby nothing would remain for the residuary legatees. *Farmers' Loan & T. Co. v. McCarthy*, 128 App. Div. 621.

¶ 461 Distribution Where There is No Residuary Gift, or Such Gift Lapses. See ¶ 449.

Through negligence or intention it sometimes happens that a will contains no residuary clause, and in such a case the residuary estate must be distributed to the next of kin of the deceased.

After termination of life estate.

Where a reversionary interest in personal property is not disposed of by will, it does not necessarily belong to those who may happen to be the testator's next of kin at the termination of the particular estate, but as an interest in the property undisposed of by will, it is to be distributed among those who answer to the legal definition of next of kin at the time of the death of testator. *Clark v. Cammann*, 160 N. Y. 315. See ¶ 449.

When residuary bequest lapses.

When a legacy lapses it may fall into the residuary estate, but when a bequest of a part of the residuary estate fails, such portion often does not go to the other residuary legatees, if any, but becomes intestate property and passes to the next of kin. It may happen that the same person is a general legatee and a residuary legatee, and may die before the testator. In such a case the general legacy may fall into the residuary estate, but the share of such legatee in the residuary estate may become undisposed of property. *Matter of Barrett*, 132 App. Div. 134.

It is said to be "clear upon the authorities that a part of the residue, of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of a residue but, instead of resuming the nature of residue, devolves as undisposed of." *Booth v. Baptist Church*, 126 N. Y. 215, 245.

This expression of the law has been repeated and maintained since it was first used by the master of the rolls, in *Scrymasher v. Northcote*, 1 Swanst. 570; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 96; *Matter of Kings Co. T. Co.*, 69 Misc. Rep. 141.

Where a legacy lapses by reason of death, and such legatee if alive would share in the residuary estate, such share is undisposed of and goes to the next of kin of testator. *Matter of Whiting*, 33 Misc. Rep. 274, 68 N. Y. Supp. 733.

Debt of residuary legatee directed to be deducted.

Where the residuary estate is divided and a debt from one residuary to testator is to be deducted, that sum does not pass as intestate property, but increases the shares of the others. *Mitchell v. Mitchell*, 149 App. Div. 897.

¶ 462 Where Persons Perish by a Common Disaster; Survivorship.

The question of survivorship, under circumstances of this character, has been a problem which has been presented to the courts from the earliest times. In the old civil law, where persons perished in a common disaster, a number of presumptions were established as a guide to the courts in determining the question of survivorship; but these presumptions have never been indulged in by the common law, and the problem has been treated as a question of fact to be disposed of in accordance with the circumstances surrounding the disaster.

The leading case on the subject in this State is that of *Newell v. Nichols* (75 N. Y. 78), in which the court states as follows (p. 89): "The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. * * * It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances shown tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears they will not undertake to solve it on account of the nature of the question, and its inherent uncertainty."

That case also laid down the further rule that a person who claims that there was any survivorship must affirmatively prove the same. *Matter of Gerdes*, 50 Misc. Rep. 88. See 119 App. Div. 440.

Under the civil law there was a presumption of survivorship between those who perished in a common disaster, based upon

sex and age, and in some jurisdictions there is such a presumption based upon physical condition and strength, but in England and in this and other States of the Union, where the common law prevails, no such presumption exists, nor is there a presumption that in such case death occurred to all at the same instant, and yet through necessity in the administration of the law the title to real property passes and personal property is distributed as if they all perish at the same instant of time *in the absence of proof of facts or circumstances tending to show survivorship among them.* *St. John v. Andrews' Inst.*, 117 App. Div. 698. See 191 N. Y. 254.

Survivors of the same accident.

Where two persons are lost by same calamity at sea, it does not follow that the one last seen alive survived the other. *Matter of Ridgway*, 4 Redf. 226.

There is no presumption in law of survivorship in case of persons who perish by a common disaster. *Newell v. Nichols*, 75 N. Y. 78.

Evidence as to being alive.

A person who can give his reasons for saying that a person is alive or was alive at a certain time may state the fact. *Matter of Herrmann*, 75 Misc. Rep. 599.

Burden of proof.

The burden of proving survivorship may, in certain cases, rest with the one who seeks to profit by it. *Dunn v. N. Amsterdam C. Co.*, 63 Misc. Rep. 225; *Matter of Lott*, 65 Misc. Rep. 422.

¶ 463 Distribution Where Legatee or Distributee Has Died.

Where the legatee or distributee survives the testator or intestate but dies before receiving payment, the amount due him should be paid to his legal representative to become part of his estate. If no legal representative is appointed the share should be paid into court to await the appointment of such legal representative. *Mat-*

ter of Morgan, 1 Misc. Rep. 71, 54 N. Y. St. Repr. 236, 22 N. Y. Supp. 1064.

If not paid to such representative within six months it should be then paid into court by paying the same to the county treasurer under the authority of section 2741 (¶ 468).

No distribution should be attempted to the next of kin or legatees of such a deceased person, except through the medium of his duly appointed representative. There is always the possibility that such person may have left unpaid debts, or that there may be a transfer tax assessable on his estate which would make such payment directly to his next of kin or legatees an illegal payment and the accounting party would not be discharged thereby.

CHAPTER LVIII.

Final Judicial Settlement, Continued; Decree of Judicial Settlement, its Force and Effect.

- ¶ 464. Force and effect of decree and of settlement.
- ¶ 465. Effect of decree considered.
- ¶ 466. Decree not conclusive on questions not in issue.
- ¶ 467. Decree may confirm investments.
- ¶ 468. § 2741. Decree may direct legacy or share paid into court.
- ¶ 469. § 2740. Decree as to payment of share of unknown person.
- ¶ 470. § 2699. Payment of money into court.
- ¶ 471. § 751. Authority for payment of money out of court.
- ¶ 472. § 2739. Payment of share of infant.
- ¶ 473. § 2736. Delivery of specific property.
- ¶ 474. § 2737. Retention of fund or property.
- ¶ 475. Payment under decree during running of time to appeal.
Duties of representative do not end with judicial settlement.

¶ 464 Decree of Judicial Settlement and Its Effect.

Force and effect of a decree of surrogate's court.

Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained.

§ 2550, Code Civ. Pro.

Effect of judicial settlement of account; summary statement.

A judicial settlement of the account of an executor, administrator, guardian or testamentary trustee, either by the decree of the surrogate's court, or upon an appeal therefrom, is conclusive evidence against all the parties of whom jurisdiction was obtained and all persons deriving title from any of them at any time, as to all matters embraced in the account and decree.

Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled; or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree.

§ 2742, Code Civ. Pro.

Effect of revision. § 2742 amended.

The amendment consists in using general language as to the parties of whom jurisdiction was obtained, and by omitting the four subdivisions which specified in what particulars a decree was

conclusive, and making it conclusive "as to all matters embraced in the account and decree."

A decree either upon a compulsory or voluntary judicial settlement is binding and conclusive on all the parties over whom jurisdiction was acquired. *Cline v. Sherman*, 78 Hun, 298, 29 N. Y. Supp. 909; aff'd, 144 N. Y. 601.

The decree is conclusive upon all of the parties thereto, although it directs an illegal payment of the funds, unless reversed on appeal. *Matter of Elting*, 93 App. Div. 516, 87 N. Y. Supp. 833.

Effect of decree of judicial settlement of an account.

It is settled by a long line of decisions that a surrogate's decree is binding as to all matters considered so long as it remains in force upon all of the parties who were properly before the court at the time the decree was entered. Objections to an account of an executor or trustee must be presented and passed upon prior to the entry of a decree settling them, or else a party is thereafter precluded from raising any question with reference thereto. So long as the decree remains in force it is final and conclusive, with reference to matters embraced within the accounting. *Burkard v. Crouch*, 169 N. Y. 399; *Weintraub v. Siegel*, 133 App. Div. 677; *Rhodes v. Caswell*, 41 id. 229; *Mutual Life Ins. Co. of N. Y. v. Schwaner*, 36 Hun, 373; aff'd, 101 N. Y. 681. *Childs v. Childs*, 150 App. Div. 656; *Wright v. Trustees of M. E. Church*, 1 Hoff. Ch. 202.

Upon the death of a person intestate, his personal estate passes into the hands of his administrators, who are alone responsible for its preservation and distribution according to law. They are required to account for the estate, parties interested are entitled to be heard upon the accounting, and when heard and a judicial settlement is had, the settlement is conclusive against all the parties who are properly cited or appeared and all persons deriving title from any of them, as to any allowances made to the accounting party for money paid to creditors, legatees, or next of kin. Code Civ. Pro., § 2742. It is also conclusive upon the sureties

on the administrator's bond. The same principle applies to the sureties upon a bond given by a guardian when there has been an accounting by him. *Scofield v. Churchill*, 72 N. Y. 565; *Gerould v. Wilson*, 81 id. 573, 583; *Deobold v. Oppermann*, 111 id. 531, 536; *Douglass v. Ferris*, 138 id. 192, 201; mod'g, 63 Hun, 413, 18 N. Y. Supp. 685; *Altman v. Hofeller*, 152 N. Y. 499; rev'g, 83 Hun, 426, 64 N. Y. St. Repr. 669, 31 N. Y. Supp. 881; *Matter of Hodgman*, 140 N. Y. 421; aff'g, 69 Hun, 484, 52 N. Y. St. Repr. 727, 23 N. Y. Supp. 725.

These decisions, in effect construing the provisions of the Code of Civil Procedure bearing upon the subject, show that, with respect to property turned over to creditors and beneficiaries as provided in a decree and with respect to the administrator of the estate up to the entry of a decree, the decree is binding and to that extent is a discharge. The decree, however, is not the termination or ending of the executorial duties in the sense or to the extent that, with respect to other assets that may be realized and in connection with which new liabilities may be incurred, executors may not be compelled to account. *Rosen v. Ward*, 96 App. Div. 266, 89 N. Y. Supp. 148; *Willetts v. Haines*, 96 App. Div. 5, 88 N. Y. Supp. 1018; aff'd, 182 N. Y. 543.

¶ 465 Effect of Decree Considered.

A decree of judicial settlement does not terminate the executorial duties of the representative. He is always in office to receive, handle, and account for other assets that may be discovered. *Rosen v. Ward*, 96 App. Div. 262. See ¶ 475.

A decree until opened or set aside is binding upon persons who were infants at the time it was made and who were represented by special guardian, if they were duly served with citation. *Matter of Hood*, 90 N. Y. 512; *Davis v. Crandall*, 101 id. 311.

Where an executor has an intermediate accounting and all

interested parties are cited and such accounting shows bonds on hand which are not legal investments, and no objection is made to holding them, the executor will not be charged on final accounting with loss on account thereof. *Matter of Douglas*, 103 N. Y. St. Repr. 687.

A decree on judicial settlement which established a trust fund and declared it to be a trust created by the will is binding upon a party who afterward desires to attack the validity of the trust. *Phalen v. U. S. T. Co.*, 100 App. Div. 264.

The decree is a final and conclusive determination as to the propriety of the sales of securities and the investment of the funds of the estate prior to the filing of the accounts therein set forth and disclosed. *Matter of Halsted*, 41 Misc. Rep. 606, 85 N. Y. Supp. 301; *Denton v. Sanford*, 103 N. Y. 607.

The decree is binding upon all parties who were cited or appeared, and it is necessary for a party pleading the decree to show that the party disclaiming it was cited. *Collier v. Miller*, 62 Hun, 99, 16 N. Y. Supp. 633, 42 N. Y. St. Repr. 66; aff'd, 137 N. Y. 332; *Matter of Gall*, 40 App. Div. 114, 57 N. Y. Supp. 835.

The presumption from a surrogate's decree judicially settling the account of an executor where all the parties interested have been cited, is that the account was correct and that the executor has accounted for all the property that came into his hands as such. *Matter of Soutter*, 105 N. Y. 514.

Where an executor or administrator dies and the estate has been mingled with that of the executor or administrator so that the right to an accounting was lost, the claimants became creditors of the estate of the executor and administrator, and a decree of distribution granted without the applicant making a claim as creditor was a protection to the representative of the second estate. *Matter of O'Brien*, 45 Hun, 281, 10 N. Y. St. Repr. 414.

Where a party seeks relief contrary to the terms of a decree, the burden is upon the representative to show the petitioner was

a party to the proceeding and so bound by the decree. *Matter of Weil*, 110 App. Div. 67.

An accounting and decree which do not show an overpayment to a party is conclusive upon other parties who seek to raise thereafter such a claim. *Skillin v. Central T. Co.*, 80 App. Div. 206, 80 N. Y. Supp. 188; *Matter of Underhill*, 117 N. Y. 471.

The decree does not bind unknown persons interested in case where no service has been had upon unknown parties by publication. *Matter of Killian*, 172 N. Y. 547; rev'g, 66 App. Div. 312, 72 N. Y. Supp. 714.

The decree binds all parties who were cited or appeared, although not all necessary parties were brought in. *Elsworth v. Hinton*, 47 Hun, 625, 15 N. Y. St. Repr. 160.

A decree on compulsory accounting is binding upon the representative, although it appeared that there was a surplus to be distributed and that no supplemental citation was issued. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 92; rev'g, 20 Misc. Rep. 305, 45 N. Y. Supp. 663.

A decree may establish the liability of an accounting party to pay a debt established, but this remedy will not preclude the creditor from seeking to impress real property with a trust and collecting his debt therefrom in a proper case. *Farrelly v. Skelly*, 130 App. Div. 803.

The decree binds a party cited who afterward alleges that he had a prior assignment of the interest of one of the legatees. *Armstrong v. Stone*, 64 Misc. Rep. 504.

A prior decree allowing charges against principal for carrying expenses, does not prevent an apportionment of such charges between life tenant and remainderman on another accounting embracing the proceeds of sale of such property. *Matter of Marshall*, 43 Misc. Rep. 238.

A decree on a former accounting is binding upon the parties to it as to the amounts therein involved and the payment or distribution of the same; but such a decree does not effect a

subsequent decision or prevent a party on another accounting from raising or litigating a question concerning the payment or distribution of funds subsequently acquired, although the second decree might differ from the first in such effect. *Rudd v. Cornell*, 171 N. Y. 114, 130.

The decree made upon an accounting which relieves the trustees from loss on account of an investment at the time the decree is made, may not protect the trustees if they continue to hold such investment after the decree and when the market conditions have changed. *Matter of Cullen*, 44 N. Y. Law Jour., No. 111.

Where a power of sale is exercised and the proceeds are accounted for, the ruling price being fair, the decree binds the parties cited although the adequacy of consideration was not litigated. *Weintraub v. Siegel*, 133 App. Div. 677.

¶ 466 Decree Not Conclusive upon Questions Not in Issue.

The decree of a surrogate is not conclusive upon the parties in establishing a rule of law which will control in the later administration of the estate. If not appealed from, it will serve as a complete protection to the accounting executor or trustee, against all of the parties duly cited, as to all questions concerning the correctness of his accounts thereby approved and the disbursements therein directed; but the jurisdiction of the surrogate to construe the will of the testator or to define or declare the rights of the beneficiaries of a trust as between themselves is limited to the necessities of the accounting then before the surrogate. *Bowditch v. Ayrault*, 138 N. Y. 222, 231; *Matter of Hoyt*, 160 id. 607, 618; *Matter of Perkins*, 75 Hun, 129; aff'd, on opinion below, 145 N. Y. 599; *Frethey v. Durant*, 24 App. Div. 58; *Matter of Hunt*, 41 Misc. Rep. 72. Having in mind the character of accountings before the surrogate, the large number of issues possible to be raised on numerous items of receipts and disbursements, and the necessity for expedition in passing upon the decree, the rule is not only logical, but is also useful and just. *Matter of Hurlburt*, 51 Misc. Rep. 263.

An expression in a decree which is not made the basis of an adjudication or direction in the decree is a mere expression of opinion and not a binding decision upon that subject. *Washbon v. Cope*, 144 N. Y. 287; rev'g, 67 Hun, 272, 50 N. Y. St. Repr. 821, 22 N. Y. Supp. 241.

The decree in one accounting when all the facts were not before the court, as to the transfer of claims, is not a bar to presenting them and getting a decree therefor upon another accounting. *Matter of Whitbeck*, 22 Misc. Rep. 494, 50 N. Y. Supp. 932; *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216; *Matter of White*, 6 Dem. 375, 15 N. Y. St. Repr. 729.

Decree rendered upon successive accountings by trustees where no question of final distribution was involved does not estop a later adjudication as to the validity of certain accumulations of income. *Cochrane v. Alexander*, 56 Misc. Rep. 212.

The decree is limited in its operation to the matters actually before the court, and therefore in a case where the ownership of property claimed by the representative is not included in the account and decree, it is no bar to an action therefor. *Matter of Peck*, 131 App. Div. 81. See also *Matter of Butler*, 66 Misc. Rep. 409.

Erroneous decree conclusive, but need not be followed in a subsequent accounting or proceeding.

Whether the decision of the Surrogate's Court is right or wrong, as long as the various decrees stand unreversed they are binding and valid adjudications; and this irrespective of whether the parties are infants or adults. *Matter of Tilden*, 98 N. Y. 434; *Matter of Hawley*, 100 id. 206.

Although the decrees of a Surrogate's Court made upon the accountings of trustees are conclusive as to the transactions and payments covered by such accountings they form no bar to the proper decision of the question so far as it relates to property coming to the hands of the trustee subsequent to the accounting and still in his hands. *Bowditch v. Ayrault*, 138 N. Y. 222;

Matter of Hoyt, 160 id. 607; *Rudd v. Cornell*, 171 id. 114; *Kirk v. McCann*, 117 App. Div. 59.

A decree made upon obtaining jurisdiction of a party is a protection to the representatives, although made under an erroneous construction given to a will. *Matter of Perkins*, 75 Hun, 129, 57 N. Y. St. Repr. 228, 26 N. Y. Supp. 958; *aff'd*, 145 N. Y. 599.

Where on an accounting payments are objected to and it appears that on previous accountings similar payments were not objected to and were allowed, the fact that as to such matters and questions the former decree was erroneous does not create a binding precedent or require a repetition of such errors in subsequent accountings as to the same estate. *Matter of Hunt*, 41 Misc. Rep. 72, 83 N. Y. Supp. 652.

¶ 467 Decree May Confirm Investments Shown by the Account.

The decree binds the parties as to the investments set out fully, and also as to the sales of property, real and personal, and the amount received and charged therefor in the account. *Weintraub v. Siegel*, 133 App. Div. 677; *Corley v. McElmeel*, 149 N. Y. 228; *Lockman v. Reilly*, 95 id. 64; *Ungrich v. Ungrich*, 141 App. Div. 485.

But such apparent approval will not in all cases relieve the trustees from the duty of discontinuing illegal investments and if they continue to hold them and a further loss occurs, they may be held liable for such loss upon another accounting, notwithstanding the prior decree. *Matter of Bannin*, 142 App. Div. 436.

Consent of beneficiary to improper or illegal investments or transactions may operate as a waiver.

A release to a trustee in respect to a breach of trust committed in the investment of trust funds operates as an acceptance of the securities in which the funds have been invested. *Blackwood v. Burrowes*, 2 C. & L. 459. A decree upon an accounting approving investments binds all parties to the proceeding, even though

the investment be unauthorized by law. *Matter of Denton v. Sanford*, 103 N. Y. 607; *Matter of Tilden*, 98 id. 434. A beneficiary may authorize his trustee to do what otherwise would be a breach of trust, or release and agree to hold him harmless for such an act after it is done. *Pope v. Farnsworth*, 146 Mass. 339; *Blair v. Cargill*, 111 App. Div. 851.

Cestuis que trustent are so subordinate to and dependent on their trustee that they should not be held bound by any act of his to which they have assented, except upon the clearest evidence that such assent was based upon a full knowledge of all facts and circumstances. *Arthur v. Nelson*, 1 Dem. 337.

Beneficiary may elect to take property.

The beneficiary of a trust may elect to approve one of several unauthorized investments or reject any or all of them. *King v. Talbot*, 40 N. Y. 76.

It seems that when a trustee misapplies funds the beneficiary may elect to take the property thus acquired and have the profits. *Holmes v. Gilman*, 138 N. Y. 369; rev'g, 64 Hun, 227, 46 N. Y. St. Repr. 110.

¶ 468 Decree Must Direct Disposition of Funds and Shares Belonging to Unknown Persons, and Persons Whose Whereabouts are Unknown.

The decree should not leave a fund or share in the hands of the accounting party with no definite direction as to its disposition. Where the person entitled to the fund is unknown the amount should be paid into the state treasury, and where the person is known but he has not been located, the fund should be paid into the county treasury.

When legacy, etc., to be paid into court.

Where it appears that the whereabouts of any legatee or distributee is unknown, the decree must direct the executor, administrator or testamentary trustee to pay into surrogate's court a legacy or distributive share, which is not paid to the person entitled thereto, at the expiration of six months from the time when the decree is made, or when the legacy or distributive share is payable by the terms of the decree; or where, at the expiration of

six months after the making of the decree, it is shown to the court that payment of a legacy or distributive share can not be made to the person entitled thereto, an order may be made directing the payment of the same into court. The money, so paid into court can be paid out only by the special direction of the surrogate; or pursuant to the judgment of a court of competent jurisdiction. The state comptroller may institute any necessary proceeding before the surrogate's court to compel the deposit of such moneys in court, which have not been paid over or deposited after the expiration of six months.

§ 2741, Code Civ. Pro.

Effect of revision. § 2748 amended.

Former section 2748 required every decree to contain the provision for payment to the county treasurer, if payment could not be made to the person entitled within two years. The present section requires the direction in the decree if it appears that there is an absentee, and shortens the time to six months. There is also added a new provision giving the state comptroller authority to enforce compliance with the direction in the decree to make the deposit with the county treasurer.

A direction in a decree to pay a share into Surrogate's Court if the owner cannot be found must be construed with section 2699, Code Civ. Pro. (¶ 470), and held to be a direction to pay into court. Payment to a surrogate is not a payment into court. *Matter of Sackett*, 38 Misc. Repr. 463, 77 N. Y. Supp. 1030.

¶ 469 Legacy, or Distributive Share, to Unknown Person to be Paid into State Treasury.

Where the person entitled to a legacy or distributive share is unknown, the decree must direct the executor, administrator, guardian or testamentary trustee to pay the amount thereof into the treasury of the state, for the benefit of the person or persons who may thereafter appear to be entitled thereto. The surrogate's court, or the supreme court, upon the petition of a person claiming to be so entitled, and upon at least fourteen days' notice to the attorney-general, accompanied with a copy of the petition, may by a reference, or by directing the trial of an issue by a jury, or otherwise, ascertain the rights of the persons interested, and grant an order directing the payment of any money, which appears to be due to the claimant, but without interest, and deducting all expenses incurred by the state with respect thereto. The comptroller, upon the production of a certified copy of the order, must

draw his warrant upon the treasury, for the amount therein directed to be paid; which must be paid by the state treasurer, to the person entitled thereto.

§ 2740, Code Civ. Pro.

Effect of revision. § 2747 amended.

The amendments consist in making the section apply to guardians and testamentary trustees.

Under this section application cannot be made to any surrogate in the State, but must be made to the surrogate who had jurisdiction of the subject matter. *Kinneally v. People*, 98 App. Div. 192.

Such fund is not money belonging to the State or any of its funds. *People ex rel. Evans v. Chapin*, 101 N. Y. 682.

The Attorney-General is not entitled to notice of hearing to ascertain who are entitled where some of the next of kin are known. *Matter of Davenport (Hughes)*, 142 App. Div. 41.

Decree may direct distribution of legacy or distributive share due an absentee, if presumption of death arises.

See ¶ 17.

The general rule that an absentee, who has not been heard of for seven years, may be presumed to be dead at the expiration of the seven years, for the purpose of distributing an estate, is well settled. See *Jackson v. Claw*, 18 Johns. 347; *Eagle v. Emmet*, 4 Bradf. 117; *Matter of Sullivan*, 51 Hun, 378; *Barson v. Mulligan*, 191 N. Y. 306, 324. Of course, the rule is to be applied with caution (*Matter of Board of Education of New York*, 173 N. Y. 321, 326), and it has limitations. The rule and its limitations are stated, with supporting authorities, in Lawson's Presumptive Evidence (pp. 251 *et seq.*). Circumstances may justify a finding of death before, or they may be such as to give rise to no presumption either at or after the expiration of seven years. Each case must necessarily depend upon its own facts. When the failure of the absentee to communicate with his friends is satisfactorily accounted for on some other hypothesis than that of death, or when no inquiry has been directed to the place where he was last known

to be, as in *Dunn v. Travis* (56 App. Div. 317), no presumption arises. But it is to be borne in mind that the rule was adopted by analogy to the statutes with reference to bigamy and to leases for life, as a rule of necessity, to fix the rights of the living with relation to the absent, and that it is necessarily an artificial rule, depending for its application upon the known facts, regardless of what the actual fact may be. Rights are not to be held in abeyance indefinitely on account of the absence of a person of whom no trace can be found. He may not be dead, but he will be presumed to be dead for the purpose of fixing the rights of those known to be living. In *Davie v. Briggs* (97 U. S. 633), Mr. Justice Harlan quotes the following rule from Stephen's Law of Evidence (Chap. 14, art. 99): " * * * A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." *Matter of Wagener*, 143 App. Div. 286.

Under circumstances of long absence of the legatee and lack of knowledge as to whether or not the legatee be alive, that fact should be determined instead of ordering the executor to hold the money two years. *Koch v. Woehr*, 3 Dem. 282; *Matter of Benjamin*, 155 App. Div. 233.

Contra.

In *Matter of Matthews* (75 Misc. Rep. 449) and *Matter of Benjamin* (77 Misc. Rep. 434) it is intimated that the presumption of death should only be applied in a direct proceeding, like application for administration, and that the decree of judicial settlement should not determine the question of death and make distribution. Where the absentee has been gone for a long time and the case is a clear one, it would certainly save much useless expense to determine the question at once.

Share paid to Comptroller even though legatee had been absent 30 years, because sufficient inquiry had not been made regarding him. *Dunn v. Travis*, 67 N. Y. Supp. 743.

¶ 470 Regarding the Payment of Money into Court and the Deposit of Securities.

So far as the same can be made applicable to the proceedings in Surrogate's Court, sections 743 to 754 of the Code apply together with section 2699, Code Civ. Pro. The provisions of section 747, Code Civ. Pro., are in terms made applicable by section 748, Code Civ. Pro., and that section follows:

Power of each court to direct payment or investment of its funds.

Each court may direct that money paid into that court in any action or proceeding brought therein, or any bond, mortgage or other security which represents property belonging to any suit or party interested therein, may be paid out, transferred, invested, or reinvested in any manner or form that appears to it best for the interests of the owners thereof. But such directions must be embodied in an order or decree of said court, founded upon proper and sufficient evidence satisfactory to the court that such disposition of the property is best for the interests of the owners thereof or parties interested therein.

§ 747, Code Civ. Pro.

As to money belonging to infants realized from a sale in partition, section 747 should be read with section 1581, Code Civ. Pro. *Thurston v. Wilbur T. Co.*, 7 Misc. Rep. 392, 57 N. Y. St. Repr. 561, 27 N. Y. Supp. 923.

Certified copy papers.

Every deposit of money, securities or other property with a county treasurer must be accompanied by a certified copy of the judgment, order or decree directing the payment into court and no such deposit shall be received by such county treasurer under any circumstance, unless it is accompanied by a certified copy of such judgment, order or decree. No certified extract of a judgment, order or decree shall be accepted by a county treasurer unless the same is directed to be taken by such judgment, order or decree and so expressed therein.

Rule 1, N. Y. State Comptroller.

As all such rules are subject to change the practitioner should procure a late copy from the comptroller.

When money or property may be paid into or deposited in court.

The court may also direct the deposit with the county treasurer of securities, belonging to the estate or fund, to reduce the penalty of the bond. § 2576, Code Civ. Pro.

A decree revoking letters may direct the payment and delivery of all money and other property into the surrogate's court. §§ 2555, 2573, Code Civ. Pro.

The money recovered in an action upon an official bond where letters have been revoked, must be paid into the surrogate's court. § 2585, Code Civ. Pro.

Depository for moneys paid into court. All moneys brought into court by order or judgment of any court of record of this state, or of any other state or of the United States, may be deposited with any such corporation that has been designated a depository by the comptroller of the state of New York, as provided by the code of civil procedure. Whenever any such corporation shall be designated by the comptroller as a depository for funds and moneys paid into court, it shall give to the people of the state a bond in the form and manner prescribed in this chapter.

§ 188, subd. 5, Banking Law.

A legacy or distributive share which is not paid by the executor or administrator to the person entitled thereto, at the expiration of six months from the date of the decree, or when the same is payable by the terms of the decree, must be paid to the county treasurer. § 2741, Code Civ. Pro.

Sums sufficient to satisfy claims of creditors for debts of decedent not due, and which the creditors will not accept in payment, or the proportion to which the claims are entitled, may be paid into the surrogate's court. § 2737, Code Civ. Pro.

A legacy or distributive share belonging to an infant, or a part thereof, whether of money or securities, may be paid by the executor, administrator or trustee into court. § 2739, Code Civ. Pro.

Money Paid into Court and Securities Deposited Must Go to County Treasurer; Power of Surrogate.

Money paid into court and securities taken; how disposed of.

Where a statute requires the payment of money into, or the deposit of a security with the surrogate's court, or the deposit of a security for the payment of money with the surrogate, the same must be paid to or deposited with the county treasurer of the county or to the chamberlain of a city, to the credit of the beneficiary, or of the estate, or of the special proceeding;

unless the statute contains special directions for another disposition thereof. Each security so deposited with the county treasurer or chamberlain must be held and disposed of by him, subject to the direction of the surrogate's court; except that he must, unless otherwise so directed, collect the principal and interest secured thereby. All money collected by or paid to the county treasurer, or chamberlain as prescribed by this section, must be held, managed, invested and disposed of by him, in like manner as money paid into the supreme court in an action pending therein. The regulations contained in the general rules of practice as specified in subdivision eight of section four of the state finance law, and the provisions of title third, of chapter eighth of this act, apply to money paid to and securities deposited with the county treasurer, or chamberlain as prescribed in this section; except that the surrogate's court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section 747 of this act.

§ 2699, Code Civ. Pro.

Paying the balance found due upon an accounting to the surrogate without a decree directing such payment is not a proper payment into court. *Matter of Te Culver*, 22 Misc. Rep. 217, 49 N. Y. Supp. 820.

Provisions governing infant's legacy or distributive share paid into court, see § 2739, Code Civ. Pro., ¶ 472.

Holder of securities is vested with title thereto.

A county treasurer, or other officer, or a guardian, committee, or other trustee, in whose name is taken a bond, mortgage, or other security, or public stock, representing money, paid into court, in an action; or to whom stock or a security, or an account, deed, voucher, receipt, or other paper, representing or relating to such money, is transferred, delivered, made, or given, pursuant to law, is vested with title for the purposes of the trust; and may bring an action upon or in relation to the same, in his official or representative character.

§ 749, Code Civ. Pro.

A county treasurer who has received court funds for investment may assign a mortgage and receive the money therefor without an express order of the court which directed the payment of the money to him. *County of Tompkins v. Ingersoll*, 81 App. Div. 344, 81 N. Y. Supp. 242; aff'd, 177 N. Y. 543.

Authority of state comptroller over funds deposited in court.

The State Finance Law, section 4, subdivision 8, authorizes the State Comptroller to:

Supervise the administration of all the funds paid into any court of record, or ordered to be so paid by a judgment, order or decree of any such court of record. He shall have power and authority to institute proceedings to enforce obedience to the judgments, orders or decrees of the said courts for the deposit of moneys and securities into court, and prescribe regulations and rules for the care and disposition thereof, which shall be observed by all parties interested therein, unless the court having jurisdiction over the same, shall make different directions, by special order duly entered in accordance with section seven hundred and forty-seven of the code of civil procedure; and the comptroller may at any time require any county clerk or clerk of any court of record, to file with any county treasurer an officially certified copy of any record, document or paper, or extracts therefrom, which he may deem necessary for the use of said county treasurer in the administration of such funds.

¶ 471 Authority for Payment of Money out of Court.

Authority for payment of money out of court.

No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition. Each order must be countersigned by the presiding judge by whose direction it is made.

§ 751, Code Civ. Pro.

Further requirements as to drafts and countersigning may be found in Rule 69 of the Supreme Court and Rules 2 and 3 of the Comptroller.

Money paid into court in one county may be paid out to a general guardian appointed in another county by filing with the petition a certified copy of petition and bond under which appointment was made. *Matter of Moody*, 2 Dem. 624.

The Supreme Court has no jurisdiction to direct payment out of money deposited by order of Surrogate's Court. *Matter of City of New York*, 200 N. Y. 138; rev'g, 137 App. Div. 803.

Payment of distributive share of alien non-resident to consul. See ¶ 458.

A judicial settlement having been had and a distributive share of an alien non-resident having been paid to the county treasurer,

on application of the Italian consul the share was directed to be paid to him. *Matter of Tartaglio*, 12 Misc. Rep. 245, 67 N. Y. St. Repr. 825, 33 N. Y. Supp. 1121.

¶ 472 Direction in Decree as to Payment of Share of Infant.

Payment of share of infant.

When a legacy or distributive share is payable to an infant, the decree shall direct that it be paid to his guardian, upon his filing sufficient security, unless the legacy does not exceed fifty dollars, or a distributive share does not exceed one hundred and fifty dollars, in which cases the decree may order it to be paid to his father, or to his mother, or to some competent person with whom the infant resides, or who has some interest in his welfare, for the use and benefit of such infant. If there be no guardian, the decree shall provide that the legacy or distributive share not disposed of in the manner aforesaid, shall be paid into or deposited with the surrogate's court.

§ 2739, Code Civ. Pro.

Effect of revision. § 2746 amended.

This section has been amended as to the amounts which may be paid to the guardian, or to the father or mother or some other competent person without giving a bond. A difference is made between a legacy and a distributive share, for the reason that a legacy is given to the infant by some person who desires the infant to have that amount of money for himself, while a distributive share falls to the infant by operation of law. Hence if a legacy exceeds \$50 its preservation for the infant ought to be insured in accordance with the wish of the benefactor, while if the distributive share is less than \$150 it may well be paid to the person having the care or support of the infant without the requirement that a bond shall be given therefor.

The former provision in this section for the application of the legacy or share to the support of the infant is now fully covered by section 2664, paragraph 351, and the liability of the guardian to account therefor comes under his general duties and obligations. The regulations about deposit in court are now contained in section 2699, paragraph 470.

The word "general" has been eliminated from this section, so that it applies to all guardians. It has been held that the former

section did not include testamentary guardians. *Matter of Klingenstein*, 156 App. Div. 749.

It was held in *Matter of the Estate of Elbert L. Burnham* (N. Y. Surr. Decs., 1896, p. 437) that the declaration contained in section 81 of the Domestic Relations Law does not confer upon either or both of the parents the powers and duties of a general guardian appointed by will or deed or by the court, or entitle them to the possession or control of the property of their children. *Matter of Schuler*, 46 Misc. Rep. 373.

The section does not require the giving of a special bond by a guardian before he may receive the rents and profits of real estate belonging to his ward. *Matter of Bettels*, 21 N. Y. St. Repr. 136, 4 N. Y. Supp. 393.

Ancillary guardian. See ¶ 99.

The definition of the use of the word "guardian" (§ 2642, ¶ 94) excludes an ancillary guardian, so this section does not apply to such a guardian.

A foreign general guardian is not entitled to receive an infant's legacy. *West v. Gunther*, 3 Dem. 386.

An ancillary guardian need not give the additional bond required from a domestic guardian. *Matter of Hunt*, 68 N. Y. St. Repr. 828, 34 N. Y. Supp. 1088.

Where the infant has no guardian in this State payment may be made to an ancillary guardian who has been duly appointed.

Sufficient security.

The surrogate may determine that the bond already given by the guardian is sufficient security, or he may require further and additional security. He has authority in fixing the bond to ascertain the nature and amount of the estate of the infant by taking the testimony of the guardian or of any other persons, and by examining the annual accounts of the guardian on file.

Such cases as *Matter of Mills (Miller)*, 29 Misc. Rep. 272, 61 N. Y. Supp. 243; *Rieck v. Fish*, 1 Dem. 79; *Matter of Flagg*, 6 id. 289; *Lowman v. Elmira R. R. Co.*, 85 Hun, 188, 32 N. Y.

Supp. 579; aff'd, 154 N. Y. 765, holding that in all cases there must be an additional bond, are not applicable under the present reading of this section, and were not after the amendment to former section 2746 made in 1910, which contained this language: "unless the surrogate shall determine that the general bond given by the guardian is ample and of sufficient amount to cover such legacy or share."

This section is supervisory in character and confers no authority upon the surrogate with reference to the investment of the property of infants. *Matter of Bolton*, 159 N. Y. 129, aff'g, 37 App. Div. 625, 56 N. Y. Supp. 1105.

The proceeds of the sale of infant's real estate may by the order of the County Court be turned over to the general guardian to be used for the support and maintenance of the infant, and the guardian must account therefor. *Allen v. Kelly*, 171 N. Y. 1, rev'g, 66 App. Div. 623; prior appeal, 55 App. Div. 454, 67 N. Y. Supp. 97; reargument denied, 171 N. Y. 656.

Income from a trust fund is not in all cases a legacy, requiring the giving of an additional bond before receiving payment. *Matter of William*, 66 Misc. Rep. 417.

Payment of share of infant.

An administrator has no right to pay a distributive share to a general guardian unless so directed by the surrogate.

The fact that the distributive share is part of the proceeds of a judgment for damages recovered for the death of the father does not change the rule. *Lowman v. Elmira, C. & N. R. R. Co.*, 85 Hun, 188, 32 N. Y. Supp. 579, 65 N. Y. St. Repr. 723; aff'd, 154 N. Y. 765.

Where there is no guardian. See ¶¶ 290, 440.

If there be no guardian, and the amount is more than that specified, the same shall be directed to be paid into court by paying the same to the county treasurer. (§ 2699, ¶ 470.)

Section 2741 authorizing the retention of the money for six months in the case of a person whose residence is unknown does

not apply where the infant is known. However, if a guardian is about to be appointed, the decree may direct payment to the duly appointed guardian when appointed, if one is appointed within a specified time, and if none be appointed, then to the treasurer of the county.

Decree where "associate" appointed with guardian.

Section 2650, Code Civ. Pro. (¶ 98), as proposed by the revisers was amended in the Legislature by incorporating a provision that in counties containing wholly or partly a city of the first or second class, a bond may be dispensed with and an "associate" guardian appointed where the fund is less than \$2,000. The person drafting the amendment evidently had in mind its operation in large offices where there was a guardian clerk who could act as associate guardian without extra compensation, and who would be under the immediate control of the surrogate. In such offices the new practice will be safe and economical.

In offices where there is no such clerk the amendment is of doubtful value and exceedingly dangerous. Surrogates will be asked to appoint the attorney for the guardian or some friend of the guardian as associate, and the result will be that the practical working of the amendment will be to enable a guardian in such a case to be appointed absolutely without security, and the only protection to the estate of the infant will be that when the fund is once deposited it then comes under the control of the surrogate who will be compelled to act as guardian himself. Under the plan of having a clerk in the office appointed no provision is made for compensation to such associate.

It is unfortunate that the result of the amendment raises a question, if, under the language now contained in the first part of the section, a bond from the guardian is required in other counties where the estate does not exceed \$2,000. But no surrogate ought to construe the section in that way as it would be contrary to the spirit and intention of the section.

Under section 2739, now being considered, a surrogate may properly hold that section 2650 does not apply, and where no

bond has been required on appointment of the guardian, require one to be given before authorizing the guardian to receive money or property under a decree.

¶ 473 Decree May Direct Delivery of Specific Property.

Idem; when specific property may be delivered.

In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties entitled to payment or distribution, in lieu of the money value of the property:

1. Where all the parties interested manifest their consent thereto by a writing filed in the surrogate's office.

2. Where any legatee or distributee files a consent to accept as payment in whole or in part any specified personal property at a value to be ascertained by appraisement.

3. Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to any infant or incompetent legatee or distributee, and the value thereof has been fixed by appraisement.

The value must be ascertained, if the consent does not fix it, by an appraisement under oath, made by one or more persons appointed by the surrogate for the purpose.

§ 2736, Code Civ. Pro.

Effect of revision. § 2744 amended.

Subdivision one has been amended so that the parties interested must consent, not simply those who have appeared. Subdivision two now provides that a legatee or distributee may file a consent to take specific property. By this means a legatee or distributee may often save the selling or the sacrifice of good securities that he would much rather have than money.

Subdivision three protects infants and incompetents in the same way, as they cannot protect themselves.

Section 2753, ¶ 135, gives commission on such property so taken at the agreed value, which protects the representative and leaves no reason for his selling the property.

Former section applied.

Transfer of interest in joint-stock association directed, instead of a sale by the executors. *Lane v. Albertson*, 78 App. Div. 607, 79 N. Y. Supp. 947.

Where securities had depreciated in value temporarily by reason of bad market conditions, a general distribution of them was ordered. *Matter of Thompson*, 41 Misc. Rep. 420; aff'd, 87 App. Div. 609, 178 N. Y. 554.

¶ 474 Decree May Direct Retention of Money or Property in Cases Where the Amount of a Debt Has Not Been Ascertained or the Ownership of Specific Property Determined.

Idem; when money or property may be retained.

Where an admitted debt of the decedent is not yet due, and the creditor will not accept present payment, with a rebate of interest; or when a debt not yet due has been disputed or rejected; or where an action is pending between the executor or administrator, and a person claiming to be a creditor of the decedent; or where on the judicial settlement of the account of a testamentary trustee a controversy respecting the right of a party to share in the fund, or other personal property held by the trustee, has not been determined; the decree must direct that a sum sufficient to satisfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, or that any personal property the right to which is in controversy, be retained in the hands of the accounting party; or be deposited in a safe bank, or trust company, subject to the order of the surrogate's court; or be paid into the surrogate's court, for the purpose of being applied to the payment of the claim, or the satisfaction of any judgment when it is due, recovered, or settled; and that so much thereof, as is not needed for that purpose, be afterwards distributed according to law.

§ 2737, Code Civ. Pro.

Effect of revision. § 2745 amended.

The conditions which arose in *Bankers Surety Co. v. Myer* (205 N. Y. 219), and *Matter of Henshaw* (37 Misc. Rep. 536), have been met in the amendment of the first part of the section. The substance of former section 2812 applying to a trustee has been incorporated here and that section repealed. Payment into court is made under section 2699, ¶ 470.

See also section 2713, ¶ 255, where retention is authorized, where real estate is sold to pay debts, and any claim is undetermined.

Former section applied.

Where a party was prosecuting an appeal to the Court of Appeals against the representatives it was not considered sufficient reason to require detention of any part of the funds. *Matter of Truslow*, 37 Misc. Rep. 189, 74 N. Y. Supp. 944.

Where the representative was a nonresident and remained out of the State to avoid suit on a claim, an order was made directing the retention of the amount of the claim. *Matter of Rasch*, 26 Misc. Rep. 459, 55 N. Y. Supp. 434.

Applied to accounts of trustees.

Former section 2812 repealed, and its substance as to settlement of controversies inserted in § 2737.

The more complete jurisdiction now existing enables the surrogate to determine many questions that could not be determined heretofore.

Jurisdiction.

Surrogate has jurisdiction to determine whether a trust has been terminated under Laws of 1893, 1896, 1897, on an accounting by trustee. *Matter of U. S. Trust Co.*, 175 N. Y. 304; rev'g, upon that point, 80 App. Div. 77. See ¶ 332.

The section applied.

Where executors have accounted, and it is afterward alleged that some of the assets accounted for were trust funds in the hands of the testator, if it appears that the executors had no knowledge of the character of such assets, the decree on judicial settlement will be a protection. *Rosen v. Ward*, 96 App. Div. 262.

Upon a settlement there must be a claim or lien upon the share to be determined to authorize the withholding of it under this section. *Matter of Horn*, 7 App. Div. 89, 39 N. Y. Supp. 954.

Bequest in trust for a daughter — *held* not to pass upon her death to her representative but to remaindermen. *Matter of Ryder*, 43 Misc. Rep. 476.

Where trust was created for the support of an infant, any per-

son who furnished such support and has not been paid therefor may present his claim against the trust estate on a judicial settlement, and the surrogate may pass upon such claim and direct such payment from the trust fund. *Gladding v. Follett*, 2 Dem. 58.

Notice of assignment of interest of beneficiary. See ¶ 33.

When a trustee has sufficient knowledge of an assignment of the interest of a beneficiary he is put upon diligent inquiry regarding the same. *Seger v. Farmers' L. & T. Co.*, 187 N. Y. 314; aff'g, 112 App. Div. 911. See also 73 App. Div. 293, 103 id. 39, 176 N. Y. 589.

Jurisdiction before the revision.

The surrogate may give effect to a valid assignment where its validity is not attacked for fraud. *Young v. Purdy*, 4 Dem. 454; *Matter of Rogers*, 16 N. Y. Supp. 197.

Accounting by trustee — allegation that objectors had released all interest in fund — *held* surrogate had no jurisdiction to determine the rights of the parties. *Van Sinderen v. Lawrence*, 50 Hun, 272, 20 N. Y. St. Repr. 72, 3 N. Y. Supp. 75. See *Matter of U. S. Trust Co.*, 175 N. Y. 304.

¶ 475 Payment Under Decree During Running of Time of Appeal.

During the thirty days in which an appeal may be taken the surrogate will not require any payment to be made under the decree. It is not usual for the representative to await expiration of thirty days before making payment; where he has no reason to think an appeal will be taken, however, he must decide as to the safety in making payment for himself.

Should an application be made to the surrogate to compel the representative to make the payment under a decree before the time to appeal had expired or while the appeal is pending in cases where the execution of the decree is not stayed, and the executor represents to the court that an appeal has been taken or that it is likely to be taken, the surrogate will not direct payment, unless

upon sufficient security given to the representative, nor will he punish the representative for contempt for not making such payments. *Matter of Armstrong*, 32 N. Y. St. Repr. 441, 10 N. Y. Supp. 889, rev'g, 29 N. Y. St. Repr. 215, 9 N. Y. Supp. 443.

Duties of executor or administrator do not end with judicial settlement.

The decree of judicial settlement is not the termination or ending of the duties of the representative in the sense or to the extent that, with respect to other assets that may be realized and in connection with which new liabilities may be incurred, the representative may not be compelled to account. *Rosen v. Ward*, 96 App. Div. 262, 89 N. Y. Supp. 148; *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642.

The representative is always in office for the purpose of performing any duties that require his action. He may at any time receive new assets, make a new inventory, and have another judicial settlement.

He may also prosecute an action for the recovery of assets not accounted for. *Steele v. Leopold*, 135 App. Div. 247, 120 N. Y. Supp. 569; aff'd, 201 N. Y. 518.

CHAPTER LIX.

Definitions of Expressions and Terms Used in Relation to Executors, Administrators, Guardians and Testamentary Trustees; Application of Chapter XVIII and its Effect; Certain Words and Phrases Construed by the Courts.

¶ 476. § 2768. Definition of expressions used in chapter XVIII.

§ 2769. Application of chapter XVIII.

§ 2770. Provisions of Code of Civil Procedure made applicable.

§ 2771. Effect of chapter on laws applicable to certain counties.

¶ 477. Certain words and phrases construed by the courts.

¶ 476 Definition of Expressions Used in This Chapter.

In construing the provisions of this chapter, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. The word "intestate," signifies a person who died without leaving a valid will; but where it is used with respect to particular property it signifies a person who died without effectually disposing of that property by will whether he left a will or not.

2. The word "assets," signifies personal property applicable to the payment of debts of a decedent.

3. The word "debts" includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses.

4. The word, "will," signifies a last will and testament, and includes all the codicils to a will.

5. The expression, "letters of administration," includes letters of temporary administration.

6. The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.

7. The word, "surrogate," where it is used in the text, or in a bond or undertaking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate.

8. The expression, "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be "judicially settled."

9. The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement.

10. The expression, "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be but has not been cited; and implies that before doing the act specified, due proof must be made, that all persons required to be cited have been duly cited.

11. The expression, "persons interested," where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise except as a creditor. Where a provision of this chapter prescribes that a person interested may object to an appointment or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending.

12. The term, "next of kin," includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

13. The expression, "real property," includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets. The word, "inheritance," signifies real property as defined in this subdivision, descended as prescribed by law. The expression, "personal property," signifies every kind of property which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator.

14. The word "guardian" refers to a guardian of an infant's person or property, or both, appointed by the surrogate's court or the supreme court, and includes a guardian appointed by will or deed.

15. Whenever in this chapter a paper or instrument is required to be "acknowledged, or proved, and duly certified," the same shall be acknowledged or proven in the same manner as a deed is required to be acknowledged or

proved and certified to be recorded in that county, except when executed within the state of New York, no certificate of the county clerk shall be required.

16. The word "respondent" when used in this chapter signifies every party to a special proceeding, except the petitioner.

17. The words "surrogate's court" and "surrogate" where they refer to jurisdiction mean the particular court or surrogate having jurisdiction of the estate or fund.

18. Whenever in this chapter a paper is directed to be deposited in the "post-office," such deposit may be made in any post-office or letter box maintained and exclusively controlled by the United States government.

§ 2768, Code Civ. Pro.

Effect of revision. § 2514 amended.

Subdivisions 14, 15, 16, 17 and 18 have been added.

Application of chapter; confirmation of previous acts.

Each provision of this chapter, relating to the jurisdiction of the surrogate's court, to take the proof of a will, and to grant letters testamentary or letters of administration or regulating the mode of proceeding in any manner connected with the estate of the decedent applies, unless otherwise expressly declared therein, whether the will was made, or the decedent died, before or after this chapter takes effect. All acts hitherto of surrogates and officers acting as such in completing by certifying in their own names any uncertified wills, and by signing and certifying in their own names any uncertified records of wills and of other proofs and examinations taken in the proceedings of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

§ 2769, Code Civ. Pro.

Certain provisions made applicable to proceedings in surrogates' courts.

Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, all other portions of this act, and the general rules of practice apply to surrogates' courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form.

§ 2770, Code Civ. Pro.

Effect of this chapter on laws applicable to certain counties and to pending proceedings.

Nothing in this chapter shall repeal, amend or modify any existing law specially applying to any county, which is inconsistent with any section of this chapter nor in any manner affect any litigation, action or special proceeding pending at the time when this act takes effect, and such pending

action or special proceeding shall proceed under the practice established, the same as though not affected by this act.

§ 2771, Code Civ. Pro.

Application to pending proceedings.

Section 2771 provides that the amendments to chapter XVIII shall not "in any manner affect any litigation, action or special proceeding pending at the time when this act takes effect, and such pending action or special proceeding shall proceed under the practice established, the same as though not affected by this act."

A special proceeding in Surrogate's Court is begun by the filing of a petition, and where a petition has been filed before September 1, 1914, the proceeding may be said to be pending, and therefore must be conducted and concluded as though the amendments had not been made. But when that particular proceeding is ended by the entry of a decree or of an order, any other proceeding begun after September first, even though relating to the same estate or fund should be conducted under the amended practice. The fact that a person died prior to September first, or that the appointment of a guardian or trustee was made prior to that time, does not extend the terms of section 2771 to a proceeding begun, regarding that estate or fund, after September first.

Where rights have vested.

In cases where absolute rights of parties have attached or become vested, the change in practice, cannot deprive a person of such rights, and the provisions of the former law should be applied. Neither should the new practice be used where that practice will take away a right because the time in which to exercise it has been shortened, but it may be applied if its effect is to give him less time than he formerly had, to do an act, provided the time remaining is a reasonable time.

Some of these questions will arise during the first few months of the application of the amended law, but they will be disposed of by the surrogates with justice to the rights and interests of all the parties interested. See also paragraphs 368 and 437.

¶ 477 **Certain Words and Phrases Construed by the Courts.**

ADVANCEMENT in its limited and statutory meaning is applicable only to cases of intestacy and to moneys advanced by a parent to a child in anticipation of such child's future share of the parent's estate. Code Civ. Pro., § 2738; Real Property Law, §§ 295, 296.

The word "advancement" is employed by courts of equity in a wider sense to denote money or property advanced as a satisfaction *pro tanto* of a general legacy, given by a parent or other person standing *in loco parentis* to a child or grandchild. *Matter of Weiss*, 39 Misc. Rep. 71, 78 N. Y. Supp. 877; *Lawrence v. Lindsay*, 68 N. Y. 108-112; *Matter of Cramer*, 43 Misc. Rep. 494, 89 N. Y. Supp. 469.

"AFTER," and like words, do not make a contingency but merely indicate when the remainder shall take effect in possession. *Clark v. Peters*, 68 Misc. Rep. 252.

"AFTER PAYMENT OF LEGACIES" are not words of limitation or exclusion. *Hulin v. Squires*, 63 Hun, 352; *aff'd*, 141 N. Y. 560.

"ALTER AND REGULATE"—*held* to give the right to determine the proportions of a fund which certain persons might take, not to give the right to designate other persons. *Matter of Tenney*, 104 App. Div. 290, 93 N. Y. Supp. 811.

"AMEND." *Cruikshank v. Cruikshank*, 39 Misc. Rep. 401, 80 N. Y. Supp. 8.

"ANCESTOR" as used in the Statute of Descent is not restricted to the direct line of blood, but may refer to the person from whom a particular estate was inherited. *Matter of Reeve*, 38 Misc. Rep. 410, 77 N. Y. Supp. 936.

ANCESTOR is used in the real estate law and the statutes to mean one who has gone before or preceded in the seizin or pos-

session of **real estate**, rather than one who was the ancestor of a family. *Matter of Kene*, 1 Gibb. Sur. Rep. 65.

“**AND**” and “**OR**.” “And” is to be read “or” and “or” read “and,” when required by the meaning and intent of the will. *Roome v. Phillips*, 24 N. Y. 463. See another phase of same case, 27 id. 357.

As said in *Roome v. Phillips* (24 N. Y. 463, 470), the rule is settled and should be adhered to that “in all cases ‘or’ is to be taken for ‘and,’ and ‘and’ is to be taken for ‘or’ as may best comport with the intent and meaning of the grant or devise.” See also *Miller v. Gilbert*, 144 N. Y. 68, 74; *Beers v. Grant*, 110 App. Div. 152; aff’d, 185 N. Y. 533.

Testator gave residue and remainder, real and personal, to his children “subject nevertheless to the dower and thirds of his wife”—*held*, that “and” should be read “or” and that no personal estate was given the wife. *O’Hara v. Dever*, 2 Keyes, 558.

“**ASSETS**.” The word “assets” signifies personal property applicable to the payment of the debts of a decedent. From § 2768, Code Civ. Pro.

“**BEQUEST**” construed as “devise” so as to make the will pass real estate. *Mills v. Tompkins*, 110 App. Div. 212, 97 N. Y. Supp. 9.

“**BETWEEN**” does not necessarily mean “by the twain.” *Matter of Kleeman*, 61 Misc. Rep. 560, 115 N. Y. Supp. 982.

“**CHILDREN**” held to mean issue of lawful marriage, not of prior unlawful cohabitation. *Gelston v. Shields*, 78 N. Y. 275.

“**CHILDREN**” held not to include grandchildren. *Schneider v. Heilbron*, 115 App. Div. 721; *Matter of Truslow*, 140 N. Y. 599; *Palmer v. Horn*, 84 id. 516.

“**CHILDREN**” construed as descendants. *Matter of Bender*, 44 Misc. Rep. 79, 89 N. Y. Supp. 731.

Case where the word “children” was held to include issue, however remote. *Prowitt v. Rodman*, 37 N. Y. 42.

Legacy to children of deceased daughter — *held*, should go *per stirpes*. *Ferrer v. Pyne*, 81 N. Y. 281.

“OUR CHILDREN” held not to include an alleged adopted child. *Hamlin v. Stevens*, 177 N. Y. 39; *aff’g*, 78 App. Div. 629.

“CONTENTS OF HOUSE.” Money is not classed as part of the “furniture” and “contents” of a house. Neither are watches and jewelry for personal wear. The general phrase “contents of house” following one of household furniture refers to articles of the same general nature. *Ludwig v. Bungart*, 33 Misc. Rep. 177, 67 N. Y. Supp. 177; *Fenton v. Fenton*, 35 Misc. Rep. 479, 71 N. Y. Supp. 1083.

“CREDITOR.” The word “creditor” includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses. From § 2768, Code Civ. Pro.

“DEBT.” The word “debts” includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action. From § 2768, Code Civ. Pro.

“DESCENT.” Lands acquired by descent are not held as acquired by purchase within the meaning of the act allowing an alien to inherit property from an alien in certain cases. *Stewart v. Russell*, 91 App. Div. 310, 86 N. Y. Supp. 625.

“DIVIDED EQUALLY.” In all the cases where the words “to be equally divided” have been employed, and it has been said that the rule of a *per capita* division “will yield to a very faint glimmer of a different intent” some method of satisfying those words by an equal division among individuals and groups of heirs mentioned in the will has been possible. *Matter of Griswold*, 42 Misc. Rep. 230, 86 N. Y. Supp. 250.

“DIVIDENDS, issues and profits” construed as “income or earnings.” *Matter of Stevens*, 111 App. Div. 773; mod’d, 187 N. Y. 471.

“EACH” defined in construing a will. *Matter of Turner*, 208 N. Y. 261.

“EXPENSES OF ADMINISTRATION.” A will which directs the payment of “testamentary charges and expenses” authorizes the payment of the expenses of defending the will from the principal of the estate especially as the will provided an annuity for the widow. *Matter of Wolfe*, 2 Dem. 305.

Legacy given, less the expenses of administration — *held*, that costs of administration did not include commissions or transfer tax. *Matter of Pray*, 40 Misc. Rep. 516, 82 N. Y. Supp. 807.

“EXPENSES AND CHARGES” when used in a will specifying what payments should be made from income given to a beneficiary do not mean compensation in lieu of commissions. *Greer v. Greer*, 5 Redf. 214.

“FAMILY” by every definition includes children. *Wormser v. Croce*, 120 App. Div. 287, 104 N. Y. Supp. 1090.

A man will be considered to have a family although he does not live with his wife. *Matter of Shedd*, 38 N. Y. St. Repr. 310; aff’d, 133 N. Y. 601.

On construction of will. *Oberndorf v. Farmers’ L. & T. Co.*, 71 Misc. Rep. 64, 129 N. Y. Supp. 814.

“FUNERAL EXPENSES.” The expression “funeral expenses,” as used in relation to sale of real estate to pay the same, includes a reasonable charge for church services, a burial lot and a suitable headstone. Part of § 2703, Code Civ. Pro.

“HEIRS” means persons who would take under Statute of Descent. *Armstrong v. Sheldon*, 43 App. Div. 248, 94 N. Y. St. Repr. 1.

Meaning of “HEIRS.” *Kiah v. Grenier*, 56 N. Y. 220; *Bodine v. Brown*, 12 App. Div. 335, 42 N. Y. Supp. 202; aff’d, 154 N. Y. 778.

"HEIRS" held to indicate next of kin. *Matter of Fidelity T. & G. Co.*, 57 App. Div. 532, 68 N. Y. Supp. 257.

DEVISE TO "H. AND HIS HEIRS" held to be limitation, and on death of H. before testator the devise lapsed. *Thurber v. Chambers*, 66 N. Y. 42.

Where there was a charge for support on such devise the charge followed the property although the devise lapsed. *Thurber v. Chambers*, 66 N. Y. 42.

HEIRS construed with reference to the exercise of a power of appointment. *Wallace v. Diehl*, 202 N. Y. 156.

Bequest to "the lawful heirs" of M. after death of P., who had the use of the bequest, M. survived both testator and P.—held, that the legacy was good but did not vest until the death of M. when the "lawful heirs" would be known. *Cushman v. Horton*, 59 N. Y. 149.

"IF HE LEAVE NO LEGITIMATE HEIRS." *Lytle v. Beveridge*, 58 N. Y. 592.

"IF THEY HAVE ANY." *Matter of Stafford*, 11 Misc. Rep. 436, 67 N. Y. St. Repr. 421, 33 N. Y. Supp. 419.

"LEGAL HEIRS." *Woodward v. James*, 115 N. Y. 346.

"HEIRS" DEFINED AND CONSTRUED. *Campbell v. Rawdon*, 18 N. Y. 412.

"HEIRS" HELD TO MEAN ISSUE. *Smith v. Scholtz*, 68 N. Y. 41.

"HEIRS" construed as heirs of the body. *Bundy v. Bundy*, 38 N. Y. 410.

"HEIRS" employed in a will as designating the successors in interest of a legatee who dies in testator's lifetime is to be interpreted as meaning the legatee's next of kin. *Matter of McCormick*, 2 Dem. 137.

HUSBAND. For all legal purposes, the man whose wife is dead continues to be her "husband," and such he is declared to be by law, and as "husband" he is entitled to certain rights in her property. *Matter of Ray*, 13 Misc. Rep. 480, 35 N. Y. Supp. 483, 70 N. Y. St. Repr. 178.

"INCOME," "INTEREST," and "PROFITS." No authorities have been cited on the briefs of counsel as to the use of the words "income" and "interest," but I find in the case of *People v. Supervisors of Niagara* (4 Hill, 20), a discussion as to the use of the word "income" as distinguished from profits of a corporation, in which the court said (pp. 23, 24): "It is undoubtedly true that 'profits' and 'income' are sometimes used as synonymous terms, but, strictly speaking, 'income' means that which comes in or is received from any business or investment of capital without reference to the outgoing expenditures; while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. 'Income,' when applied to the affairs of individuals, expresses the same idea that *revenue* does when applied to the affairs of a State or nation, and no one would think of denying that our government has any revenue because the expenditures for a given period may exceed the amount of receipts."

In *Sims' Appeal* (44 Pa. St. 345), it was said: "The word 'income' means 'the gain which proceeds from property, labor, or business.' Bouvier's Law Dict. When applied to a sum of money, or money in the public debt, it is equivalent to 'interest.'" Sometimes interest and income are used together without any discrimination between them, as in *Biddle's Appeal* (99 Pa. St. 278). Income and dividends have been held to be synonymous or convertible terms. *Mills v. Britton*, 64 Conn. 23; *Spooner v. Phillips*, 62 id. 62; *Lord v. Brooks*, 52 N. H. 78; *Matter of Murphy*, 80 App. Div. 238, 80 N. Y. Supp. 530.

"INTERMEDIATE ACCOUNT." The expression "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement. From § 2768, Code Civ. Pro.

“INHERITANCE.” The word “inheritance” signifies real property, as defined in subdivision 3, section 2768, Code Civ. Pro., descended as prescribed by law.

“INTESTATE.” The word “intestate” signifies a person who died without leaving a valid will; but where it is used with respect to particular property it signifies a person who died without effectually disposing of that property by will, whether he left a will or not. From § 2768, Code Civ. Pro.

“ISSUE AND PROFITS.” *Stewart v. Phelps*, 71 App. Div. 91; aff’d, 173 N. Y. 621; *Matter of Roberts*, 40 Misc. Rep. 512, 82 N. Y. Supp. 805.

ISSUE. Generally issue is coextensive with descendants, and includes children of living ancestors, and the distribution in such cases is made *per capita*. *Matter of Bauerdorf*, 77 Misc. Rep. 656, 138 N. Y. Supp. 673; *Rasquin v. Hamersley*, 152 App. Div. 522, 137 N. Y. Supp. 578; aff’d, 208 N. Y. 630.

“JUDICIAL SETTLEMENT.” The expression “judicial settlement,” where it is applied to an account, signifies a decree of a Surrogate’s Court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be “judicially settled.” From § 2768, Code Civ. Pro.

“LAWFUL ISSUE” is equivalent to descendants. *Phelps v. Cameron*, 109 App. Div. 798, 96 N. Y. Supp. 1014.

“ISSUE — LAWFUL.” *Olmsted v. Olmsted*, 51 Misc. Rep. 309.

“LETTERS OF ADMINISTRATION.” The expression “letters of administration” includes letters of temporary administration. From § 2768, Code Civ. Pro.

“LEGAL REPRESENTATIVES.” *Griswold v. Sawyer*, 125 N. Y. 411; rev’g, 56 Hun, 12.

Generally means executor or administrator. *Rockland, etc., v. Leary*, 203 N. Y. 469, 482.

"MAY LEAVE" construed as "MAY HAVE." *DuBois v. Ray*, 35 N. Y. 162.

MONEY. "ALL MONEY THAT REMAINS" held to include mortgages, stocks, and bonds. *Matter of Blackstone*, 47 Misc. Rep. 538, 95 N. Y. Supp. 977.

In *Smith v. Burch* (92 N. Y. 228), the court said: "The word 'money' has sometimes been held to include securities, stocks, personal property, money in bank, and money in the hands of agents, when the context and all the circumstances which were rightfully considered indicated such to be the intention of the testator." The same doctrine is held in *Sweet v. Burnett* (136 N. Y. 204).

"READY MONEY." *Smith v. Burch*, 92 N. Y. 228.

MONEY RECEIVED, with reference to allowing commissions thereon. *Matter of Hurst*, 111 App. Div. 460, 97 N. Y. Supp. 697.

"NEXT OF KIN" does not include widow. *Luce v. Dunham*, 69 N. Y. 36.

"WIDOW" one of "next of kin" in certain cases. *Betsinger v. Chapman*, 88 N. Y. 487.

"NEXT OF KIN" neither husband nor wife. *Matter of Devoe*, 171 N. Y. 281.

The term "next of kin" includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife. From § 2768, Code Civ. Pro.

"ORDER." A direction of a Surrogate's Court, made or entered in writing, and not included in a decree, is an order. Part of § 2548, Code Civ. Pro.

"PARAPHERNALIA" of a man held to include watches, jewelry, and clothing. *Matter of Cooper*, 5 Dem. 495.

“PASS TO” construed as words of gift. *Whitwell v. Whitwell*, 146 App. Div. 270, 130 N. Y. Supp. 906.

“PERSONAL REPRESENTATIVES.” *Matter of Hall*, 2 Dem. 112.

“PERSON INTERESTED.” The expression “person interested,” where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor. Where a provision of this chapter prescribes that a person interested may object to an appointment, or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending. From § 2768, Code Civ. Pro.

A widow who has assigned her interest in the estate, which assignment is challenged for fraud, is still excluded from the class of persons interested. *Woodruff v. Woodruff*, 3 Dem. 505.

“PERSONAL PROPERTY.” The expression “personal property” signifies every kind of property which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator. From § 2768, Code Civ. Pro.

The term “personal property” is defined by statute. Section 4 of the Statutory Construction Law (chapter 677, Laws of 1892) provides as follows: “The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which

may be the subject of ownership. The term chattels includes goods and chattels."

"PREVIOUSLY." To refer the word "previously" to a death occurring in the lifetime of the testator, only, after the general rule, would seem to do violence to the plain meaning of the context, which rises above all artificial rules. *Mead v. Maben*, 131 N. Y. 255; *Stokes v. Weston*, 142 id. 433; *Benson v. Corbin*, 145 id. 351; *People's T. Co. v. Flynn*, 44 Misc. Rep. 6.

"PROFITS" do not include increase from natural causes. *Matter of Vedder*, 40 N. Y. St. Repr. 119; mod'd, in 42 id. 300.

"PROPERTY." "All the household property in the dwelling-house" is broad enough to include the coal and wood provided for the use of the family, and also a shotgun. *Matter of Frazer*, 92 N. Y. 239.

Devise of real estate "including all the furniture and personal property in and upon the same or in any manner connected therewith" does not carry money and securities in a vault on part of such premises used as an office. *Matter of Reynolds*, 124 N. Y. 388.

PURCHASE. The popular and commercial meaning of the words "to purchase" is doubtless "to buy," but generally in law the word has a more extended meaning and includes every mode of acquiring land except by descent. *Stamm v. Bostwick*, 122 N. Y. 48.

"REASONABLE TIME" for converting real estate cannot be fixed for all cases — in ordinary cases eighteen months will be considered reasonable. *Matter of Weston*, 91 N. Y. 502; *In re Fargo*, 20 Misc. Rep. 137, 45 N. Y. Supp. 732.

"REAL PROPERTY." The expression "real property" includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof,

or in any manner entitled thereto, and except those which are declared by law to be assets. From § 2768, Code Civ. Pro.

“RELATIVES MENTIONED IN MY WILL” held to include only blood relations although relatives by marriage were so mentioned. *Blossom v. Sidway*, 5 Redf. 389.

“REST, RESIDUE AND REMAINDER” held to include an estate in remainder in the property held in trust for the widow’s annuity. *Thomas v. Thomas*, 43 Misc. Rep. 541, 89 N. Y. Supp. 495.

“STATUTORY ALLOWANCES” include exempt property to be set off to a widow but do not include a distributive share. *Matter of Mersereau*, 38 Misc. Rep. 208, 77 N. Y. Supp. 329.

“SURRENDER” involves the idea of yielding, of delivering in response to a demand, and not of making a sale and delivery. *County of Tompkins v. Ingersoll*, 81 App. Div. 344.

“SURROGATE.” The word “surrogate,” where it is used in the text, or in a bond or undertaking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate. From § 2768, Code Civ. Pro.

“SURVIVOR,” construed. *Lyons v. Mahan*, 1 Dem. 180; aff’d, 98 N. Y. 372.

SURPLUS defined. *Matter of Jones*, 75 Misc. Rep. 47, 134 N. Y. Supp. 859.

THEN LIVING; THEN ALIVE. Construed and applied in determining when vesting took place. *Wright v. Wright*, 140 App. Div. 634, 125 N. Y. Supp. 875.

“UNINCUMBERED REAL ESTATE.” An unpaid tax is not such an incumbrance. *Crabb v. Young*, 92 N. Y. 56.

“UNMARRIED” is to be construed as not being married at the time. *Matter of Union T. Co.*, 179 N. Y. 261; aff’g, 92 App. Div. 620.

“UPON RETURN OF CITATION.” The expression, “upon the return of a citation,” where it is used in a provision requiring an act to be done in the Surrogate’s Court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be but has not been cited, and implies that before doing the act specified, due proof must be made that all persons required to be cited have been duly cited. From § 2768, Code Civ. Pro.

“UPON THE DEATH OF,” and like words, do not make a contingency, but merely indicate when the remainder shall take effect in possession. *Clark v. Peters*, 68 Misc. Rep. 252, 124 N. Y. Supp. 961.

“USE AND APPLY” construed. *Potter v. Hodgman*, 81 App. Div. 233, 80 N. Y. Supp. 1056; aff’d, 178 N. Y. 580.

“WHEN” construed as “thereafter.” *Central Trust Co. v. Egleston*, 47 Misc. Rep. 475, 95 N. Y. Supp. 945; aff’d, 110 App. Div. 893.

“WHOSOEVER THEY MAY BE” held to imply that futurity was annexed to the gift and, therefore, an estate did not vest on the death of the testator. *Matter of Bowers*, 109 App. Div. 566; aff’d, 184 N. Y. 574.

“WILLFUL DEFAULT” defined. *Matter of Mallon*, 43 Misc. Rep. 569, 89 N. Y. Supp. 554; *Matter of Howard*, 110 App. Div. 61, 64; aff’d, 185 N. Y. 539.

“WILL.” The word “will” signifies a last will and testament, and includes all the codicils to a will. From § 2768, Code Civ. Pro.

WIDOW; WIFE. Unless there be something in a will indicating the contrary, a gift to the “wife” of a designated married man is a gift to the wife existing at the time of the making of the will and

not to one whom he may subsequently marry. *Van Brunt v. Van Brunt*, 111 N. Y. 178; *Van Syckel v. Van Syckel*, 51 N. J. Eq. 194. A gift to the "widow" of a designated person, however, has a broader application and includes such wife as may survive him. *Schettler v. Smith*, 41 N. Y. 328; *Swallow v. Swallow's Admr.*, 27 N. J. Eq. 278; *Meeker v. Draffen*, 137 App. Div. 537; aff'd, 201 N. Y. 205.

Where the gift was to the wife and children then living (at the death of a son) a second wife, even though married after the probate of the will, was held to be intended. *Matter of Harris*, 152 App. Div. 52, 136 N. Y. Supp. 711; aff'd, 206 N. Y. 690.

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